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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885

No. ~~352.~~ 86

WILLIAM H. INMAN, JOHN H. INMAN, JAMES SWANN, BERNARD S. CLARK AND ROBERT W. INMAN, CO-PARTNERS UNDER THE FIRM-NAME OF INMAN, SWANN & COMPANY, PLAINTIFFS IN ERROR,

vs.

THE SOUTH CAROLINA RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED OCTOBER 8, 1885.

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INDEX.

	Original.	Print.
Caption	1	1
Complaint	2	1
Summons	6	3
Marshal's return	7	3
Answer	8	3
Jury called	12	5
Evidence for plaintiffs	13	6
Notice to take testimony	13	6
Testimony of Bernard S. Clark	15	7
Stipulation as to taking testimony	34	15
Exhibit 1—Bill of lading No. 15692, October 27, 1883	35	16
2— " No. 17584, October 18, 1883	38	17
3— " No. 9162, October 25, 1883	42	19
4— " No. 15679, October 18, 1883	46	21
5— " No. 15686, October 24, 1883	49	23
6—Account of South Carolina Railway Co. with Inman, Swann & Co., November 17, 1883	52	25

JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 8, 1887.

	Original.	Print.
Evidence for defendant	53	26
Exhibit A—Copy of open policy No. 3556 to Inman, Swann & Co., September 7, 1883, from The Mechanics' and Traders' Fire Insurance Co. of New York	53	26
B—Copy of cargo policy No. 7265 to Inman, Swann & Co., September 6, 1883, from The Greenwich Insurance Co. of the city of New York	65	30
C—Copy of cargo policy No. 21773 to Inman, Swann & Co., August 29, 1883, from The Phœnix Insurance Co.	77	35
D—Agreement of insurance companies, December 1, 1883	88	39
E—Agreement of insurance companies, January 18, 1884	89	39
Notary's certificate	91	40
Hearing	92	41
Plaintiffs' bill of exceptions	93	41
Form of bill of lading	94	41
Testimony of Bernard S. Clark (cross)	98	43
Agreements of insurance companies	99	43
Extracts from policy of Mechanics' and Traders' Insurance Co.	108	47
Defendant's requests	110	48
Plaintiffs' requests	112	49
Order allowing writ of error, &c.	118	51
Judgment	120	51
Execution	121	52
Bond	125	54
Writ of error	130	54
Clerk's certificate	134	56

1 THE UNITED STATES OF AMERICA, } *To wit:*
District of South Carolina, }

At a circuit court of the United States for the fourth circuit, in and for the district of South Carolina, begun and holden at Charleston, in the district aforesaid, on the first Monday in April, 1885, before the Honorable Hugh L. Bond and the Honorable George S. Bryan, judges of the said United States for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

WILLIAM H. INMAN, JOHN H. INMAN, JAMES SWANN, BERNARD S. Clark, and Robert W. Inman, Citizens of the State of New York and Copartners in Trade under the Firm Name of Inman, Swann & Co., Plaintiffs,

against

THE SOUTH CAROLINA RAILWAY COMPANY, a Corporation Created under the Laws of South Carolina, Defendant.

2 Be it remembered that heretofore, to wit, on the 18th day of July, in the year of our Lord one thousand eight hundred and eighty-four, came into court the plaintiffs, William H. Inman, John H. Inman, James Swann, Bernard S. Clark, and Robert W. Inman, citizens of the State of New York and copartners in trade under the firm name of Inman, Swann & Co., by their attorney, J. N. Nathans, and filed the following complaint, which complaint is in the words and tenor following:

Complaint.

The plaintiffs, complaining of the defendant, allege—

I. That the plaintiffs, William H. Inman, John H. Inman, James Swann, Bernard S. Clark, and Robert W. Inman, are copartners in trade under the firm name of Inman, Swann & Co. and citizens of the State of New York, and the defendant is a corporation created by and under the laws of the State of South Carolina, and that said defendant is a common carrier, doing business as such.

II. That on the 24th day of October, A. D. 1883, the Co-
3 lumbia and Greenville Railroad Company received from W. H. Stapleton, at Newberry, South Carolina, two hundred and fifty bales of cotton, to be transported, for the freight money then agreed upon, from Newberry aforesaid over and by the said Columbia and Greenville railroad and its connecting roads and lines of transportation until delivered to the plaintiffs at the city of York, in the State of New York.

That on the 18th day of October, A. D. 1883, at Newberry, South Carolina, the Columbia and Greenville Railroad Company received from W. H. Stapleton two hundred and ninety-nine bales of cotton, to be transported, for the freight money then agreed upon, from Newberry aforesaid over and by the said Columbia and Greenville railroad and its connecting roads and lines of transportation until delivered to the plaintiffs at the city of New York aforesaid.

That on the 25th day of October, A. D. 1883, the Columbia and Greenville Railroad Company received from W. H. Stapleton, at Prosperity, South Carolina, eighty-two bales of cotton, to be transported, for the freight money then agreed upon, from Prosperity aforesaid over and by the said Columbia and Greenville railroad and its connecting roads and lines of transportation until delivered to the plaintiffs at New York aforesaid.

That on the 18th day of October, A. D. 1883, the Columbia and Greenville Railroad Company received from W. H. Stapleton, at Laurens, South Carolina, forty bales of cotton, to be transported, for the freight money then agreed upon, from Laurens aforesaid over and by the Columbia and Greenville railroad and its connecting roads and lines of transportation until delivered to the plaintiff at New York aforesaid.

That on the 27th day of October, A. D. 1883, the Columbia and Greenville Railroad Company received from W. H. Stapleton, at Newberry, South Carolina, one hundred and thirty-eight bales of cotton, to be transported, for the freight money then agreed upon, from Newberry aforesaid over and by the said Columbia and Greenville railroad and its connecting roads and lines of transportation until delivered to the plaintiffs at New York aforesaid.

III. That the several lots of cotton shipped, as set forth in paragraph II herein, and amounting in the aggregate to eight hundred and nine bales, were in the course of said transportation delivered to and received by the defendant, a common carrier and one of the aforesaid connecting lines of transportation, in Columbia, South Carolina, to be by the said defendant, for its proportion of the freight money agreed upon as aforesaid, safely carried to Charleston, South Carolina, and there delivered to the next connecting carrier in course of transportation to their place of destination as aforesaid.

IV. That said defendant did not safely carry and deliver as aforesaid the said eight hundred and nine bales of cotton, but, on the contrary, whilst the said cotton so received for transportation was in the possession and custody and under the control of the defendant as a common carrier, two hundred and forty-eight bales thereof were, by the carelessness and negligence of the defendant, its officers, agents, and servants, destroyed by fire, to the damage of plaintiffs fifteen thousand dollars.

Wherefore plaintiffs demand judgment against the defendant for *his* damages aforesaid, together with the costs of this action.

J. N. NATHANS,
Plaintiffs' Attorney.

6 *Summons.*

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

WILLIAM H. INMAN, JOHN H. INMAN, JAMES SWANN, BERNARD S. Clark, and Robert W. Inman, Citizens of the State of New York and Copartners in Trade under the Firm Name of Inman, Swann & Co., Plaintiffs,

against

THE SOUTH CAROLINA RAILWAY COMPANY, a Corporation Created under the Laws of South Carolina, Defendant.

Summons for relief. (Complaint served.)

To The South Carolina Railway Company, defendant in this action:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscriber, at his office, Broad street, Charleston, S. C., on or before the rule day occurring twenty days next after the service of this summons on you, exclusive of the day of service.

7 If you fail to answer this complaint within the time aforesaid the plaintiffs will take judgment against you for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, at Charleston, the seventeenth day of July, anno Domini one thousand eight hundred and eighty-four, and in the 109th year of the sovereignty and Independence of the United States of America.

J. N. NATHANS,
Plaintiff's Attorney.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist of S. C.

Marshal's Return on Summons.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

INMAN, SWANN & Co., Citizens of New York,

vs.

THE SOUTH CAROLINA RAILWAY COMPANY, a Corporation Created under the Laws of South Carolina.

8 I hereby certify that on the eighteenth (18) day of July, A. D. 1884, at Charleston, S. C., I served on the above-named de-

fendant, in the person of John B. Peck, general manager of said corporation, the summons and complaint in this action, by delivering copies thereof to him personally and leaving the same with —.

T. J. TUOMEY,
U. S. Marshal.

And on the 13th day of August, A. D. 1884, came into court the defendant, The South Carolina Railway Company, by its attorneys, Simonton & Barker, and filed the following answer, which answer is in the words and tenor following:

Answer.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

WILLIAM H. INMAN, JOHN H. INMAN, JAMES INMAN, BERNARD S. Clark, and Robert W. Inman, Citizens of the State of New York and Copartners in Trade under the Firm Name of Inman, Swann & Co., Plaintiffs,

9 *against*

THE SOUTH CAROLINA RAILWAY COMPANY, a Corporation Created under the Laws of South Carolina, Defendant.

The answer of the South Carolina Railway Company, defendant.

This defendant, answering the complaint, says—

I. That it has not sufficient knowledge or information upon which to found a belief respecting the composition of the plaintiff firm nor of the citizenship of the parties thereto; that it is a corporation under the laws of South Carolina and is a common carrier doing business as such.

II. That it admits the statements of the second paragraph made respecting the shipment, names of shippers, place of shipment, and number of bales shipped, and avers that at the date of the receipt and shipment of said cotton bills of lading were given therefor, in which were stated the conditions, stipulations, and agreements upon which said cotton should be carried by the railroad

10 company receiving it and by the connecting roads, which bills of lading and the conditions, stipulations, and agreements thereof were received and accepted by the plaintiffs and constitute the contract between them and the defendant.

III. It admits that the said bales of cotton so received, amounting in the aggregate to eight hundred and nine bales, in due course of transportation came into the hands of this defendant, and, subject to the conditions, stipulations, and agreements of said bills of lading, were carried to the city of Charleston, the terminus of this defendant, and were stowed in the yards of this defendant.

For a First Defence.

It admits that of the eight hundred and nine bales of cotton so carried by it under said bills of lading two hundred and fifty-eight bales were destroyed by fire. It denies each and every other allegation of the IV paragraph of the complaint.

For a Second Defence.

11 That among other stipulations and agreements in said bills of lading under which said cotton so destroyed by fire was carried is the following, to wit: And it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation, whereby any legal liability may be incurred by the terms of this contract, that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton.

That the plaintiffs had fully insured said cotton so destroyed by fire in solvent companies from risks, among which fire was one, and that at the time of the occurrence of said fire said cotton was fully covered by insurance.

But that this desendant has not had the benefit of such insurance, nor have the plaintsffs given or offered to give it the benefit of such insurance.

12 Wherefore defendant demands judgment, and that the complaint be dismissed.

SIMONTON & BARKER,
Defendant's Attorneys.

Acceptance of Service.

Service accepted.
Aug. 9, 1884.

J. N. NATHANS,
Pl'ffs' Att'y.

And at the April term of the said court, begun and holden at Charleston aforesaid, on the first Monday of April, 1885, this case came up for trial before the following jury, to wit: William Perry, foreman, D. R. Phifer, R. Le Roy Crook, W. H. Mongold, L. R. Tilman, Reed Youmans, William Reese, F. M. Weston, E. P. Riker, E. H. Barton, Robert Black, and G. P. De Medices.

The pleadings were read to the court and jury, and the following testimony was introduced by the plaintiffs, which testimony is in the words and tenor following:

13 *Testimony in Behalf of Plaintiffs.*

Notice to take testimony pursuant to sections 863, 864, & 865 of United States Revised Statutes.

In the Circuit Court of the United States, District of South Carolina.

WILLIAM H. INMAN, JOHN H. INMAN, JAMES SWANN, BERNARD S. Clark, and Robert W. Inman, Citizens of the State of New York, Copartners Trading under the Firm Name of Inman, Swann & Co., Plaintiffs,

against

THE SOUTH CAROLINA RAILWAY COMPANY, a Body Corporate under the Laws of South Carolina, Defendant.

Messrs. Simonton & Barker, defendant's attorneys:

Please take notice that at 11 a. m. on Tuesday, the 18th day of November, A. D. 1884, will be taken on behalf of plaintiffs herein, before Jonathan B. Curry, Esqr., a notary public in and
14 for the city, county, and State of New York, at his office, No. 16 Exchange Place, in said city of New York, the deposition *de bene esse* of Bernard S. Clark, at which time and place you are entitled to be present and cross-examine the said witness, the said witness being a resident of and living in the said city of New York, at a distance of more than one hundred miles from the place where the trial of this action is to be held.

And should the examination of said witness not be concluded on the day herein named, then his examination will be taken on each succeeding day, Sundays excepted, at the same time and place, before the officer above named, until such examination shall have been completed.

November 6th, 1884.

J. N. NATHANS,
Pl'ffs' Att'y.

Acceptance of Service.

Service of a copy of within notice accepted this 6th day of Nov., 1884.

SIMONTON & BARKER.

In the Circuit Court of the United States, District of South Carolina.

15 WILLIAM H. INMAN, BERNARD S. CLARK, JOHN H. INMAN, James Swann, and Robert W. Inman, Citizens of the State of New York, Copartners Trading under the Firm Name of Inman, Swann & Co., Plaintiffs,

vs.

THE SOUTH CAROLINA RAILWAY CO., a Body Corporate under the Laws of South Carolina, Defendant.

Before J. B. Currey, Esq., commissioner.

NEW YORK, *Nov.* 18, 1884—11 a. m.

Appearances: George A. Black, Esq., on behalf of the plaintiff; Horace Barnard, Esq., on behalf of the defendant.

BERNARD S. CLARK, called as witness on behalf of plaintiffs, being duly sworn, testified as follows:

By Mr. BLACK:

Q. What is your name, age, occupation, and place of residence?

A. Bernard S. Clark; age, 37; residence, New York city; occupation, cotton merchant.

Q. Are you connected with any firm in business; if yea, what is the firm's name?

16 A. I am. The firm's name is Inman, Swann & Co.

Q. Who compose that firm?

A. William H. Inman, John H. Inman, James Swann, Bernard S. Clark, and Robert W. Inman.

Q. How long has that firm been in existence as a firm—as it is now composed, I mean?

A. Well, since the 10th day of September, 1883.

Q. Where do the other members of the firm, besides yourself, reside?

A. All in New York city.

Q. Where is the place of business of the firm?

A. 101 Pearl street.

Q. The members of the firm are all residents and citizens of the State of New York?

A. They are.

Q. Was your firm the owners of any cotton which was being transported by the defendant at the time of the fire?

A. It was.

Q. Have you the bills of lading of that cotton?

A. I have the bills of lading.

Q. Please produce them.

A. There they are (witness producing them).

Offered in evidence, marked Plaintiffs' Exhibits 1 to 5, inclusive.

17 It is stipulated that an endorsement by the commissioner of the name of the court, title of action, and number of exhibit will be a sufficient endorsement.

Q. Did you have any personal knowledge of the circumstances attending the fire by which some of this cotton was damaged?

A. I did not.

Q. Had you received invoices of the cotton prior to the receipt of the bills of lading, or were the bills of lading received first?

A. Just about the same time.

Q. You received a certain quantity of the cotton mentioned in these bills of lading, did you not?

A. Yes, sir.

Q. Is there any endorsement on the bills of lading themselves showing what was received of the different lots? Take No. 1 first. Take them in their order and tell us how many bales you received and how many bales you did not receive.

A. (After examining bills of lading.) Well, these bills of lading have not all been returned. There were other bills of lading which have not been returned to me.

Q. Have you got now your invoice books?

A. I have them.

18 Q. Have you prepared or caused to be prepared in your office a tabulated statement showing the invoice values of those bales of cotton which did not reach you?

A. Yes, sir.

Q. (Handing witness paper.) Is this it?

A. Yes, sir; that is the statement.

Q. Is it correct?

A. I have examined this schedule or tabulated statement and find it agrees with the invoice.

Q. The weights given here are the weights ascertained—how?

A. It is the average weight of the lot shipped.

Q. The lot embraced a very much larger number of bales than is specified in the schedule?

A. Yes, sir.

Q. The gross weight of the lot was given and you ascertained the average from that?

A. Yes.

Q. What are the prices which are given in this schedule? Are those the prices mentioned in the invoice?

A. Invoice cost.

Q. And those invoices are from whom? Are they from one party or different parties?

A. I think they are all one party (examining); all from one party.

Q. Who is the party?

19 A. William H. Stapleton.

Q. The invoices themselves embraced how many bales; can you give me that by a moment's looking and examining the books? What was the gross number of bales in all those different invoices?

A. (After examining.) 885.

Q. I see the word in this one (handing witness bill of lading) "Newberry b. l.;" what does it mean?

A. It means the bill of lading was made at Newberry.

Q. I see here "Prosperity."

A. That means it was signed at Prosperity.
Q. And "Lawrence?"
A. That is the same; means the name of the place of shipment.

Schedule offered in evidence, marked, as stipulated, Plaintiffs' Exhibit 6.

Q. What was the gross invoice value of the cotton not delivered?
A. $11,483.95.
Q. What deduction have you made from that?
A. The freight, $766.74.
Q. Making the net claim how much?
A. $10,717.21.

20 Cross-examination by Mr. BARNARD:

Q. Please look at your books and say what was the invoice value of the 885 bales?
A. (Examining books.) $38,167.29.
Q. Was any part and what part, if any of this cotton was insured; if yea, in what company? Answer fully.

Objected to as immaterial.

A. It was insured in the Phœnix Ins. Co., Mechanics' and Traders' Ins. Co. of New York, and the Greenwich Ins. Co.; that is all, and it was all insured.

Counsel for the plaintiffs moves to strike out so much of the answer as states that the property was insured on the ground that the contract of insurance, if any, was in writing, and will speak for itself and show what, if any, insurance there was.

Q. Have you any such contracts of insurance or policies with you; and, if so, will you produce the same?
A. I have them all.
Q. Will you produce them?
21 A. I do produce them (handing them to counsel).

Policies offered in evidence.
Objected to as immaterial and irrelevant.
Marked Defendant's Exhibits, as stipulated, A, B, and C, respectively.
It is stipulated that certified copies shall be received in evidence in place of the originals which the witness desires to retain.

Q. Has the firm of Inman, Swann & Co. received any indemnity for the loss occasioned by the burning the cotton mentioned in this matter?
A. We have not.
Q. Has the firm of Inman, Swann & Co. received any indemnity?
A. No, sir.
Q. Has any one for it, for that firm?
A. No, sir.

Q. Have you any agreement with either of the insurance companies mentioned before in relation to this loss on this cotton other than is expressed on the face of their respective policies?

Objected to as immaterial and irrelevant, and as not specifying that it relates to a contract in existence at the time of the shipment, but apparently refers to transactions after the loss had been incurred.

22

Question repeated.

A. We have.

Q. Is it in writing?

Same objection.

A. It is.

Q. Will you produce it?

A. I produce them (producing two papers).

Mr. BLACK: Are you going to offer them in evidence?

Mr. BARNARD: I wish to ascertain if it is relevant.

Q. When were these agreements made—there is one with each I believe—made after or before the making of the policies?

A. After the policies were made.

By Mr. BLACK:

Q. And after the fire?

A. Yes, sir.

The two papers offered in evidence by the counsel for the defendant.

Objected to by counsel for the plaintiffs as irrelevant and immaterial, and on the ground that the liability of the company, whatever it was, had attached at the moment the fire occurred.

Marked Defendant's Exhibits D and E, respectively, copies to be substituted with like effect as the originals.

Q. Do you not wish to modify your statement in regard to the receipt by Inman, Swann & Co. of any indemnity for the loss occasioned by the burning of the cotton? The question that I asked you before was, "Has the firm of Inman, Swann & Co. received any indemnity for the loss occasioned by the burning of the cotton mentioned in this matter?" and you answered that you had not. Now, do you wish to modify that statement?

23

A. No; I don't think there was any indemnity at all. Nothing indemnifies me but money.

Q. Do you know whether or not this suit was brought after the making of the agreement, Defendant's Exhibit D—the one dated December 1st, 1883—was the suit brought after making that one?

A. Yes, sir.

Q. Was it brought before or after making the agreement, Defendant's Exhibit E, dated January 18th?

A. I think it was after.

Q. Do you know what and by whom instructions to bring the suit were given, if any?

Objected to.

A. They were given by me.

24 Q. Were they in writing; are they in your possession, and will you produce them?

Objected to.

A. My recollection is that the instructions were given in the form of a telegram.

Q. You have not got it?

A. No, sir.

Q. Addressed to whom was it?

A. Addressed to Mr. Gallgher, in Charleston, South Carolina.

Q. What was Mr. Gallaher's business?

A. I believe he was an adjuster of averages—an insurance adjuster.

Q. Was there any other agreement with these insurance companies, or either of them, in relation to the bringing of this suit?

Objected to as immaterial and irrelevant.

A. No, sir.

Q. (Repeated.)

A. No, sir.

Q. No agreement as to who should pay the expenses and cost of the same?

Same objection.

A. There was no agreement except in this wise: That Mr. Gallaher told me there would be no expense to us.

25 Q. When and where and how did he so tell you?

Same objection.

A. I have had two or three conversations with him on the subject in New York here.

Q. When?

A. I can't tell about dates; after the time the suit was started—prior to that—here in New York.

Q. How did he so tell you? Did he write it or speak it?

A. It was in conversation.

Q. What, if any, was Mr. Gallaher's connection with this matter?

A. He was introduced to me at first by our insurance brokers as one who had several cases growing out of this loss by this fire. He wanted our case.

Q. Is that all your answer?

A. Yes, sir; I think that covers the question, does it not? If not, I will be glad to give you any more.

Q. Did he say whom he wanted it for?

Objected to. Same objection.

A. He had a lot of other cases, he said, and wished to represent them all—wanted to get all the cases he could to represent.

26 Q. Did he say why he wished to represent them all?

Same objection.

A. Not to my recollection.

Q. In your conversations with him relating to your claim, did Mr. Gallaher ever mention the insurance companies who issued policies marked Defendant's Exhibits A, B, and C, to you?

Objected to.

Q. Now let me ask you what you mean by that? *Q.* Talk about these policies?

A. No, sir.

Q. (Repeated.)

A. I don't think he mentioned the companies by name.

Q. Did he represent himself to be their agent in the matter?

Same objection.

A. He did not.

Q. Were you in any way informed that he was their agent?

A. I was not.

Q. I mean by that question, of course, your firm?

A. I mean that, of course. I speak as a member of the firm.

Q. When Mr. Gallaher told you that you would be at no expense in the matter, did he say who would pay it?

27 Objected to. Same objection.

A. He did not.

Q. Did you put any faith in his assurance that you would not be at any expense in the matter?

Same objection.

A. I put faith in it; I am the one who had all to do with this thing, anyhow.

Q. Why did you put faith in it?

A. Because I believed I could depend upon what he said.

Q. Do you not know that Mr. Gallaher represented the insurance companies issuing Defendants' Exhibits A, B, and C?

A. I did not know it.

Q. Have you any reason to believe so?

Same objection.

A. I am rather inclined to think he did and does now.

Q. You have had the entire management of this whole matter, haven't you?

A. Yes, sir; I have.

Q. And what do you understand the arrangement with the insurance companies or their agent to be in relation to this suit?

Objected to.

28 A. By our polices, in case of loss, we have to pay four per cent. on that loss to keep our policy good for $20,000 all the time. My object is to get this money from the railroad company and save this four per cent., and $150 average comes in there, and, in case I don't get — from them, to fall back on my insurers—the insurance companies—and make them pay it. That is the exact reason, and if I don't get it from them the idea is that I will fall back on the insurance company.

Q. (Repeated.)

Objected to upon the same ground, and also upon the further ground that whatever there is is in writing and speaks for itself.

A. Under that the insurers are to pay my loss in case I am unsuccessful in getting it from the railroad company.

Q. (Repeated.)

A. Well, I am inclined to believe that Mr. Gallaher may have some arrangement with the companies, but it is all guess-work in regard to that arrangement.

Q. Have you never had any direct communication with either of these companies or officers of them in regard to this matter?

A. I have not.

29 Q. Do you know whether the firm of Inman, Swann & Co. has borrowed any money from either the Phœnix, Mechanics' and Traders', or the Greenwich Company since December 1st, 1883?

Objected to.

A. They never borrowed a dollar prior or after from any of them.

Q. Has your firm agreed to wait and not to present its claims on the insurers under the policies issued until after it shall have tried to collect its claim from the railroad company, the defendants here in this suit?

Same objection. Writing speaks for itself.

A. We have not. These are the only agreements (indicating Defendant's Exhibits D and E).

Q. What consideration is given for the payment by the insurance companies of six per cent. on your claim; what do you give them for the payment?

Same objection.

A. They agree in this——

Q. What consideration is given; what consideration do you give them for the payment of six per cent. interest?

30 A. Well, by going ahead and trying to collect the money ourselves.

Q. From whom?

A. From the railroad company.

Q. And suppose you fail, then what?

Same objection.

A. Suppose we fail to collect it from the railroad?
Q. Yes, sir.
A. Then I expect to get it from the insurance companies.
Q. How much—the whole of the loss and additional expenses?

Same objection.

A. The amount of the loss, *the* less four per cent., and the sum of $150 as called for in the policy, plus interest—plus the six per cent. interest—plus interest at six per cent. from January 17th, 1884.
Q. And what else?
A. That is all.
Q. Your costs and expenses—don't you expect to get them back?
A. I expect Gallaher will look after that.
Q. Do you know whether any part of these expenses have been paid, and by whom, if you know?
A. Of course, I don't know anything about that.

Q. Your firm—has it paid or agreed to pay any of the ex-
31 penses of this suit?

Same objection.

A. It has not.
Q. Did you or your firm employ any counsel for plaintiff in this suit?
A. We authorized Mr. Gallaher to bring suit.
Q. (Repeated.)
A. No; not personally.
Q. Was not your authority to Mr. Gallaher merely to use your name as plaintiffs in this suit?

Same objection.

A. His authority was to bring suit in our name if he failed to collect from the railroad.

Redirect examination:

By Mr. BLACK:

Q. That is, he was to bring suit if he failed without suit?
A. Yes, sir.
Q. Did you authorize the clause which I find in the bill of lading, "The company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton?"

Objected to as immaterial.

A. We did not.

32 Q. Was the firm the owner of the cotton at the time of shipment?

A. We were.

Recross-examination:

By Mr. BARNARD:

Q. You have made your claim on the railroad company, the defendant, under that bill of lading containing that claim, haven't you?

A. We have.

Q. You have received the balance of the cotton and settled the freight with defendants under the same bill of lading, have you not?

A. We received the balance of the cotton and settled for the freight on the same under the same bill of lading.

Q. You were the owner at the time of the shipment, you say. Your agent at the time of shipment accepted that bill of lading, did he not?

A. He did.

Q. He had authority to accept bills of lading, didn't he?

A. Yes.

Q. Your agent had authority to accept these bills of lading for you, had he not?

A. He had authority to take bills of lading for the cotton, but had to accept what the company would give him or no bill of lading.

Q. Are these the first bills of lading with this clause con-
33 tained in them that you have ever received from the defendant?

A. I never examined any of the bills of lading, and I never examined these until my attention was called to them.

Q. (Repeated.)

A. That I am unable to say.

Q. Give the name of your agent there.

A. William H. Stapleton.

Q. Who is the person named as shipper?

A. William H. Stapleton.

Q. In Charleston?

A. No, sir; in Newberry, S. C.

Testimony closed.

B. S. CLARK.

Subscribed and sworn to before me.

[SEAL.] J. B. CURREY,
Notary Public, #158, *N. Y. Co.*

34 In the Circuit Court of the United States for the District of South Carolina.

WILLIAM H. INMAN *et al.*
against
THE SOUTH CAROLINA RAILWAY COMPANY.

It is stipulated that the deposition of Bernard S. Clark may be taken by a stenographer and the notes, when written out and signed

by the witness, may be certified by Jonathan B. Currey, notary public, with like effect as if written out by him.

Nov. 18, 1884.

(Signed) HORACE BARNARD,
Att'y for Def'ts on X Examination.

(Signed) GEO. A. BLACK,
Att'y for Plaintiff on Examination.

Index.

	Direct.	Cross.	Redirect.	Recross.
Bernard S. Clark	1	7	19	20

35 Piedmont Air Line.

No. 15692. *Bill of Lading.*

NEWBERRY, S. C., *Oct.* 27, 1883.

Received of W. H. Stapleton one hundred and thirty-eight bales of cotton, marked, numbered, and weighing as below, to be transported by Columbia & Greenville Railroad Company and connecting lines and steamships (with liberty to compress) unto order notify Inman, Swann & Co. at New York upon payment of 71 — per 100 lbs. or — per bale freight, and upon the following conditions, viz:

Neither the Columbia & Greenville Railroad Company, the companies constituting the t-rough line, nor any one of them, will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, or any usurped civil or military authority, storage, the effect of heat and cold, dampness, rust, loss in weight, mending, whether the cotton be in actual transit or be waiting shipment or delivery or be in depots, at stations, on wharves, or at sea or in port or on cars, boat, vessel, or steamer. Neither the Columbia & Greenville Railroad Company nor any of the railroad or steamship companies over which this cotton shall pass will be responsible for any loss, damage, or detention arising from fire after delivery of said cotton to any vessel, steamship, steamship company, or other water carrier, whether such fire occurs on board such vessel or steamship or while in the custody or possession of any steamship company or other water carrier awaiting transhipment or delivery.

It is further understood and agreed between the parties
36 hereto that the railroad company above mentioned or any railroad, steamship company, or other water carrier by whom this cotton may be transported will not be responsible for any loss, damage, or delay caused by accident or damage to machinery, collision, ice, storms, shipwreck, or any other accident of the seas, bays, or rivers, as they assume no marine risk whatever; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made, in writing, within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's

warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any legal liability may be incurred by the terms of this contract that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton. The delivery by any navigation company, where it is the last carrier, shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at the owner's risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations,
37 to tow barges and lighters, laden or unladen, and to transfer to lighters or to any other steamship or vessel and to sail with or without pilots. All articles of freight, on arrival at place of destination, are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon.

[Written across the face:] Endorsement: cancelled. McManus·

No. of bales.	Marks.	Weights.
32	4 E E	56,580 lbs.
79	5 H H	
23	6 B B	
4	7 Z Z	

In witness whereof the agent hath affirmed to one bill of lading.

J. B. MAZYCH,

For the Parties in Interest Separately, but not Jointly.

(Endorsed:) U. S. cir. court, dis. So. Car. Wm. H. Inman *et al. vs.* The South Carolina R'y Co. Pl'ffs' Exhibit 1. Nov. 18, '84. J. B. Currey. Deliver 11–10, ex Delaware, seventy-three (73) b. cotton. McMan., D. C. Deliver to the order of Inman, Swann & Co. W. H. Stapleton.

38 Piedmont Air Line.

No. 17584. *Bill of Lading.*

LAURENS, *Oct.* 18, 1883.

Received of W. H. Stapleton forty bales of cotton, marked, numbered, and weighing as below, to be transported by Columbia & Greenville Railroad Company and connecting lines and steamships (with liberty to compress) unto order not'y Inman, Swann & Co. at

New York upon payment of 74 — per 100 lbs. or — per bale freight, and upon the following conditions, viz:

Neither the Columbia & Greenville Railroad Company, the companies constituting the through line, nor any one of them, will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbery, or any usurped civil or military authority, storage, the effect of heat and cold, dampness, rust, loss in weight, mending, whether the cotton be in actual transit or be waiting shipment or delivery or be in depots, at stations, on wharves, or at sea or in port or on cars, boat, vessel, or steamer. Neither the Columbia & Greenville Railroad Company nor any of the railroad or steamship companies over which this cotton shall pass will be responsible for any loss, damage, or detention arising from fire after delivery of said cotton to any vessel, steamship, steamship company, or other water
39 carrier, whether such fire occurs on board such vessel or steamship or while in the custody or possession of any steamship company or other water carrier awaiting transhipment or delivery.

It is further understood and agreed betweeen the parties hereto that the railroad company above mentioned or any railroad, steamship company, or other water carrier by whom this cotton may be transported will not be responsible for any loss, damage, or delay caused by accident or damage to machinery, collision, ice, storms, shipwreck, or any other accident of the seas, bays, or rivers, as they assume no marine risk whatever; and neither the said companies constituting this line nor any of them will be liable for any loss or or damage unless the claim be made, in writing, within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any legal liability may be incurred by the terms of this contract that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit
40 of any insurance which may have been effected upon or on account of said cotton. The delivery by any navigation company, where it is the last carrier, shall be at its wharf, and at its option, if not removed during the day of their arrival, they may be stored at the owner's risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, to tow barges and lighters, laden or unladen, and to transfer to lighters or to any other steamship or vessel, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon.

[Written across the face:] S. C. R. R.

No. of bales.	Marks.	Weight.
Forty	5 D E ---- 7 6 E E ---- 23 7 G H ---- 10 40	17,800 lbs.

In witness whereof the agent hath affirmed to one bill of lading.

J. H. BOWEN,

Ag't for the Parties in Interest Separately, but not Jointly.

(Endorsed:) U. S. cir. court, dist. So. Ca. Wm. H. Inman *et al. vs.* The South Carolina R'y Co. Pl'ffs' Exhibit 2. Nov. 18, '84. J. B. Currey.

41

Deliver 11–3, ex Gulf Stream ---- 24 b. c. McM.
" 11–6, " C. Atlanta ---- 5 " McM.
" 11–10," Delaware ---- 2 " McM.

Deliver to the order of Inman, Swann & Co. W. H. Stapleton.

Burned of this b. l.:

5 D E ---- 3
6 E F ---- 1
---- 4 b. c.
---- 31 deliv'd by S. S. Co.
---- 35
---- 5 due J. S. & Co.

42

Piedmont Air Line.

No. 9162. *Bill of Lading.*

PROSPERITY, S. C., *Oct.* 25, 1883.

Received of W. H. Sapleton eighty-two bales of cotton, marked, numbered, and weighing as below, to be transpa-ted by Columbia & Greenville Railroad Company and connecting lines and steamships (with liberty to compress) unto order notify Inman, Swan & Co., at New York, upon payment of 69 — per 100 lbs. or — *any* bale freight, and upon the following conditions, viz:

Neither the Columbia & Greenville Railroad Company, the companies constituting the through line, nor any one of them, will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, or any usurped civil or military authority, storage, the effect

of heat and cold, dampness, rust, loss in weight, mending, whether the cotton be in actual transit or be waiting shipment or delivery or be in depots, at stations, on wharves, or at sea, or in port, or on cars, boat, vessel, or steamer. Neither the Columbia & Greenville Railroad Company nor any of the railroad or steamship companies over which this cotton shall pass will be responsible for any loss, damage, or detention arising from fire after delivery of said cotton to any vessel, steamship, steamship company, or other water
43 carriers, whether such fire occurs on board such vessel or steamship or while in the custody or possession of any steamship company or other water carrier awaiting transhipment or delivery.

It is further understood and agreed between the parties hereto that the railroad company above mentioned or any railroad, steamship company, or other water carrier by whom this cotton may be transported will not be responsible for any loss, damage, or delay caused by accident or damage to machinery, collision, ice, storms, shipwreck, or any other accident of the seas, bays, or rivers, as they assume no marine risk whatever; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made in writing within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation, whereby any legal liability may be incurred by the terms of this contract, that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of
44 any insurance which may have been effected upon or on account of said cotton. The delivery by any navigation company, where it is the last carrier, shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at the owner's risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist all vessels in all situations, to tow barges and lighters, laden or unladen, and to transfer to lighters, to any other steamship or vessel, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon.

[Written across the face:] S. C. R'y.

No. of bales.	Marks.	Weight.
12	4 D D	34,789.
50	5 P P	
18	6 G G	
2	700	
82		

In witness whereof the agent hath affirmed to one bill of lading.

D. M. LANGFORD,

For Parties in Interest Separately, but not Jointly.

(Endorsed:) U. S. cir. court, dis. So. Car. Wm. H. Inman *et al. vs.* The South Carolina R'y Co. Pl'ffs' Exhibit 3. Nov. 18, '84. J. B. Currey. Deliver 11–6, ex Atlanta, 4 b's cotton. McM. Deliver to the order of Inman, Swann & Co. W. H. Stapleton.

45 Burned of this b. l.:

5 P P	16
6 G G	3
4 D D	1
700	2
	22 b. c.
	4 del'v'd S. S. Co.
	26
	56 due J. S. & Co.

46 Piedmont Air Line.

No. 15679. *Bill of Lading.*

NEWBERRY, *Oct. 18th*, 1883.

Received of W. H. Stapleton 299 bales of cotton, marked, numbered, and weighing as below, to be transported by Columbia & Greenville Railroad Company and connecting lines and steamships (with liberty to compress) unto order notify Inman, Swann & Co., at New York, upon payment of 73 — per 100 lbs. or — per bale freight, and upon the following conditions, viz:

Neither the Columbia & Greenville Railroad Company, the companies constituting the through line, nor any one of them, will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbery or any usurped civil or military authority, storage, the effect of

heat and cold, dampness, rust, loss in weight, mending, whether the cotton be in actual transit or be waiting shipment or delivery, or be in depots at stations, on wharves, or at sea, or in port, or on cars, boat, vessel, or steamer. Neither the Columbia & Greenville Railroad Company nor any of the railroad or steamship companies over which this cotton shall pass will be responsible for any loss, damage, or detention arising from fire after delivery of said cotton to any vessel, steamship, steamship company, or other water carrier, whether such fire occurs on board such vessel or steamship or while in the custody or possession of any steamship company or other water carrier awaiting transhipment or delivery. It is further under-
47 stood and agreed between the parties hereto that the railroad company above mentioned, or any railroad, steamship company, or other water carrier by whom this cotton may be transported, will not be responsible for any loss, damage, or delay caused by accident or damage to machinery, collision, ice, storms, shipwreck, or any other accident of the seas, bays, or rivers, as they assume no marine risk whatever; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made, in writing, within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation, whereby any legal liability may be incurred by the terms of this contract, that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton. The delivery by any navigation company, where it is the last carrier, shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at the owner's risk or be permitted to lie where landed. The steamers of the companies of this line are at lib-
erty to touch at any port or ports, to tow and assist vessels in
48 all situations, to tow barges and lighters, laden or unladen, and to transfer to lighters or to any other steamship or vessel, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon.

[Written across the face:] Via S. C. R. R.

No. of bales.	Marks.	Weights.
35	4 X X	122,590.
87	5 3 X	
82	6 W O	
17	7 Z Z	
78	5 W W	
299		

In witness whereof the agent hath affirmed to one bill of lading.
H. G. HOOF.
For the Parties in Interest Separately, but not Jointly.

(Endorsed:) U. S. cir. court, dis. So. Car. Wm. H. Inman *et al. vs.* The South Carolina R'y Co. Pl'ffs' Exhibit 4. Nov. 18, '84. J. B. Currey.

Delivered	10–20	ex	Gulf Stream	17	b. c. *cotton.*	McM.
"	10–27	e-	Delaware	150	" "	McM.
"	10–30	"	Charleston	113	" "	McM.
"	11–3	"	Gulf Stream	17	" "	
				297		

Two hundred & ninety-seven (297) b. c. deliv'd. McManus, D. C.
Deliver to the order of Inman, Swann & Co. W. H. Stapleton.

49 Piedmont Air Line.

No. 15686. *Bill of Lading.*

NEWBERRY, *Oct. 24th*, 1883.

Received of W. H. Stapleton 250 bales of cotton, marked, numbered, and weighing as below, to be transported by Columbia & Greenville Railroad Company and connecting lines and steamships (with liberty to compress) unto order notify Inman, Swann & Co., at New York, upon payment of 71 — per 100 lbs. or — per bale freight, and upon the following conditions, viz:

Neither the Columbia & Greenville Railroad Company, the companies constituting the through line, nor any one of them, will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, or any usurped civil or military authority, storage, the effect of heat and cold, dampness, rust, loss in weight, mending, whether the cotton be in actual transit or be waiting shipment or delivery, or be in depots, at stations, on wharves, or at sea, or in port, or on cars, boat, vessel, or steamer. Neither the Columbia & Greenville

Railroad Company nor any of the railroad or steamship companies over which this cotton shall pass will be responsible for any loss, damage, or detention arising from fire after delivery of said cotton to any vessel, steamship, steamship company, or other water carrier, whether such fire occurs on board such vessel or steamship or while in the custody or possession of any steamship company or other water carrier awaiting transhipment or delivery. It is further understood and agreed between the parties hereto that the railroad company above mentioned or any railroad, steamship company, or other water carrier by whom this cotton
50 may be transported will not be responsible for any loss, damage, or delay caused by accident or damage to machinery, collision, ice, storms, shipwreck, or any other accident of the seas, bays, or rivers, as they assume no marine risk whatever; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made, in writing, within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation, when by any legal liability may be incurred by the terms of this contract, that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton. The delivery by any navigation company, where it is the last carrier, shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at the owner's risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, to tow barges and lighters, laden or unladen, and to transfer to lighters or to any other steamship or vessel, and to sail with or without pilots. All
51 articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon.

[Written across face:] Via S. C. R. R.

No. of bales.	Marks.	Weights.
29	4 X X	102,500.
115	5 C C	
40	6 B B	
18	5 W W	
16	7 Z Z	
32	4 E E	
250		

In witness whereof the agent hath affirmed to one bill of lading.

H. G. HOOF,

For the Parties in Interest Separately, but not Jointly.

(Endorsed:) U. S. circuit court, dis. So. Car. Wm. H. Inman *et al. vs.* The South Carolina R'y Co. Pl't'ff's Exhibit 5. Nov. 18, '84. J. B. Currey.

Delivered 11–3,	ex Gulf Stream	84	b. c.	McM.
" 11–10,	" Delaware	8	"	McM.
" 11–12,	" C. Columbia	3	"	McM.
		95		

Ninety-five (95) b's cotton delivered. McManus, D. C.

Deliver to the order of Inman, Swann & Co. W. H. Stapleton.

52 Copy.

NEW YORK, *Nov. 17th*, 1883.

South Carolina Railway Co. to Inman, Swann & Co., Dr., Cotton Exchange Building, No. 101 Pearl St., for 248 b. c. burned at Charleston, S. C., Oct. 29th, 1883.

				Oct.	Lbs.			
5 S X	1	b. c.	on Newbury b. l.,	18th,	443,	@ $10\frac{9}{16}$	----	46 79
6 W O	1	"	" "	18th,	437,	@ $10\frac{5}{16}$	----	45 06
4 X X	18	"	" "	24th,	8,149,	@ $10\frac{5}{8}$	----	865 83
5 C C	57	"	" "	24th,	25,308,	@ $10\frac{3}{8}$	----	2,625 70
6 B B	40	"	" "	24th,	17,880,	@ $10\frac{1}{8}$	----	1,810 35
5 W W	4	"	" "	24th,	1,788,	@ $10\frac{1}{4}$	----	183 27
7 Z Z	4	"	" "	24th,	1,876,	@ $9\frac{7}{8}$	----	185 26
4 E E	32	"	" "	24th,	14,304,	@ $10\frac{5}{8}$	----	1,519 80
5 H H	58	"	" "	27th,	25,961,	@ $10\frac{3}{8}$	----	2,693 45
4 E E	4	"	" "	27th,	1,788,	@ $10\frac{5}{8}$	----	189 97
6 B B	3	"	" "	27th,	1,341,	@ $10\frac{1}{8}$	----	135 78

						Oct.	Lbs.		
5	P	P	16 b. c. on	Prosperity	b. l.	25th,	7,008, @ $10\frac{3}{8}$	----	727 08
6	G	G	3 "	"	"	25th,	1,323, @ $10\frac{1}{16}$	----	133 13
4	D	D	1 "	"	"	25th,	459, @ $10\frac{9}{16}$	----	48 48
7	O	O	2 "	"	"	25th,	880, @ $9\frac{13}{16}$	----	86 35
5	D	E	3 "	Laurens	"	18th,	1,380, @ $10\frac{1}{4}$	----	141 45
6	E	F	1 "	"	"	18th,	462, @ 10c.	----	46 20
									11,483 95
				Less freight				----	766 74
				Due Inman, Swann & Co				----	10,717 21

[Endorsed:] U. S. cir. court, dist. So. Car. Wm. H. Inman *et al. vs.* The South Carolina R'y Co. Pl't'ff's Exhibit 6. J. B. Currey. Nov. 18th, 1884.

53 Frank & Du Bois, fire, marine, and railroad insurance, 45 & 47 William street.

NEW YORK, *Nov. 17th*, 1883.

To Inman, Swan & Co:

In accordance with the provision of this policy the estimated loss sustained by this company of $3,667 in consequence of fire at Charleston, S. C., about Oct. 29th, '83, is hereby reinstated and $114.90 additional premium is charged by this company therefor, it being understood and agreed that when the above loss is finally adjusted the amount reinstated and the premium charged shall be made correct.

Attached to policy No. 3556, Mechanics' & Traders' Ins. Co., A. T. Kingman, agent.

54 Inman, Swann & Co., for account whom it may concern:

$20,000 on cotton from points of shipment in the United States to New York and from New York to places by railroads, ferryboats, and lighters, covering — and all the risks of fire and inland navigation and transportation while in transit from and to said points, also on any vessel or lighter in the harbor or bay of New York, and also not to exceed $2,500 on any one steamer from New York to ports in the New England States and to places on the Hudson river, and thence by railroad to inland places; and it is understood and agreed that this policy covers said cotton for a period not to exceed 10 days while in railroad depots and sheds or warehouses, streets, or yards, and on dock awaiting shipment, and also for a like period while on dock, in warehouses, and in railroad depots and sheds, or on streets or in yards after arrival at destination before removal by consignee or consignees.

The total amount of each and every loss, less $150 to be deducted in lieu of average, shall be paid within thirty days after receipt of proofs of loss, any and all clauses in the printed part of this
55 policy to the contrary notwithstanding.

In event of loss the assured agrees to subrogate to the in-

surers all their claims against the transporters of said cotton not exceeding the amount paid by said insurers.

And it is agreed that if at the happening of any casualty that the insured have any other insurance covering the cotton hereby insured, then such insurance shall contribute with this insurance *pro rata* as to their respective amounts.

It is also agreed that in the event of loss the assured agree to pay the insurers additional premium or premiums at the rate of 4% on the amount of such loss or losses, and this policy is thereby to be reinstated and in force to the full amount of $20,000, unless either party desire the cancelment of same.

Other insurance permitted 12 mo's from Aug. 29th, '83.

Loss, if any, payable to Inman, Swann & Co.

This policy to be liable only to the extent of $6,666.66, being ⅓d part as specified above.

Attached to policy No. —.

[On margin:] In the event of loss, damage, detriment, or hurt to said cotton it shall be the duty of the assured to use all lawful and proper efforts for the safeguard and recovery of the property without prejudice to this insurance, and this company will contribute to the just and reasonable charges thereof in proportion as the sum named in this policy bears to the whole amount of insurance to be kept on said property.

56 (Open cargo.) (Local Form.) No. 3556. $6,666.66.

Mechanics' & Traders' Fire Ins. Co. of N. Y., by this policy of insurance on account of Inman, Swan & Co., do make insurance and cause the several persons endorsed hereon or in a book attached hereto for that purpose by a duly authorized agent of the said insurance company to be insured for the sum endorsed hereon or therein in each case upon all kinds of lawful goods, wares, merchandise, and produce laden on board the good vessel or vessels, boat or boats, railroad or carriage, lost or not lost, at and from ports and places to ports and places on a lawful and regular route and voyage as endorsed, subject to the conditions of this policy or of any contract proposition covered by this policy, according to their true intent and meaning.

Beginning the adventure upon the said property from and immediately following the loading thereof at the port or place named in the endorsement, and so shall continue and endure until the same shall arrive and be safely landed at the port or destination and not to exceed forty-eight hours after the time of arrival

57 Touching the adventures and perils which the said insurance company is contented to bear and take upon itself, they are of the lakes, rivers, canals, railroads, fires, jettisons, and all other perils and misfortunes that have or shall come to the hurt, detriment, or damage of the said property or any part thereof, excepting all perils, losses, or misfortunes arising from the want of ordinary care and skill in loading and stowing the cargo of or in navigating the said vessel; from theft, barratry, or robbery or other

legally excluded causes; and in case of loss or misfortune it shall be lawful and necessary to and for the insured or insurers, their agents, factors, servants, and assigns, to sue, labor, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandise or any part thereof without prejudice to this insurance; nor shall the acts of the insured or insurers in recovering, saving, and preserving the property insured in case of disaster be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned without prejudice to the rights of either party; to the charges whereof the said
58 insurance company will contribute in such proportion as the sum herein insured bears to the whole value of the property so insured. Moneys and bullion, promissory notes and other evidences of debt, books of account, written securities, deeds, or other evidences of title to property of any kind are not covered by this policy unless expressly defined as so insured.

And in case of loss such loss to be paid in thirty days after proof of loss and proof of interest in said property are furnished the said insurance company: Provided always, and it is hereby further agreed, That if the said insured shall have made any other insurance upon the property aforesaid prior in date to this policy, then the said insurance company shall be answerable for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured, and the said insurance company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from; and in case of any insurance upon the said property subsequent in date to this policy the said insurance company shall, nevertheless, be answerable for the full extent of the sum by them subscribed hereto
59 without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent insurance had been made; and in case of loss or damage to the property hereby insured the said insurance company or their agent or representative at or nearest the first port of discharge shall have prompt notice of same, and shall have every opportunity and facility for ascertaining the cause, extent, and amount of damage by personal inspection, appraisal, or sale of the damaged property. It is also agreed that the property be warranted by the insured free from any charge, damage, or loss which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade or any trade in articles contraband of war. It is furthermore hereby expressly provided that no suit or action against the said insurance company for the recovery of any claim for loss or damage upon, under, or by virtue of this policy shall be sustained in any court of law or equity unless such suit or action shall be commenced within the term of twelve months next after the disaster causing the loss or damage shall occur; and in case any such suit or action shall be commenced after the expiration of twelve months
60 next after the disaster causing such loss or damage shall have

occurred the lapse of time shall be taken and deemed as conclusive evidence and a conclusive defence against the validity of the claim thereby so attempted to be enforced.

It is also agreed and understood that in case of loss or damage under this policy the assured in accepting payment therefor hereby and by that act assigns and transfers to the said insurance company all his or their right to claim for loss or damage as against the carrier or other person or persons, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by the said insurance company, and any act of the insured waiving or transferring or tending to defeat or decrease any such claim against the carrier or such other person or persons, whether before or after the insurance was made under this policy, shall be a cancellation of the liability of the said insurance company for — on account of the risk issued for which loss is claimed.

And it is understood and agreed that the said insurance company or their agent shall have free access at all reasonable hours to
61 the books, accounts, instructions, and correspondence of the assured containing statements of or which relate to shipments and receipts covered by this policy; and this policy may be declared void by either party on giving a written notice to that effect to the other party, but without prejudice to any shipment or liability made or incurred prior to the service of such notice.

Deck cargoes.—It is understood that property covered by this policy shall be under deck, unless otherwise specified and charged for additionally in the endorsement hereon, and deck cargoes are insured against total loss of packages only. The minimum rates of such loss to make a claim shall be ten per cent., except salt, which shall be twenty per cent., of the whole number of packages insured on deck, and in all cases on deck risk to be free from damage by wet, breakage, leakage, or exposure.

Warranted by the insured free from any claim for loss or damage arising from seizure, detention, or the consequences of any hostile act of the United States Government, or of the people of any seceding or revolting State of this Union, or from the acts of parties sympathizing with or acting for or with such State or the
62 inhabitants thereof, and also from any loss or damage from piracy or letter of marque, or of the acts of any government hostile to the United States.

Warranted by the insured free from damage or injury from dampness or frost, heating, sweating, steaming, change of flavor, or being spotted, discolored, musty, or mouldy, except caused by actual water contact with the article damaged, and to be free from liability for leakage on molasses or other liquids or breakage of articles liable to break from their own nature, unless occasioned by the perils insured against.

If the voyage aforesaid shall have been begun and shall have terminated before the date of any endorsement on or under this policy, then there shall be no return of premium on account of such determination.

This policy is subject to the usages and regulations of the port of New York in all matters of adjustment and settlement of losses and averages not herein otherwise clearly specified and provided for, as may be stated by a competent disinterested adjuster of marine losses, to be designated by the insurers, but no damage to be paid unless amounting to —.

63 In witness whereof the president of the Mechanics' & Traders' Insurance Company of New York hath hereunto subscribed his name and caused the same to be attested by their secretary, but the same shall not be valid until countersigned by the duly authorized agent of said company at ——.

J. M. TOMPKINS, *Secretary.*

Countersigned at New York this seventh day of September, 1883.
(Signed) JAS. R. LOTT, *President.*
A. T. KINGMAN, *Agent,*
Pr. C. H. K.

(Endorsed:) Open cargo. (Local form.) The Mechanics' & Traders' Fire Ins. Co. of New York. Open policy No. 3556. To Inman, Swan & Co. Expires Aug. 29th, 1884. Copy. U.
64 S. circuit court, dist. of South Carolina. Wm. H. Inman *et al. vs.* The S. Carolina R. R. Defendant's Exhibit A. (Copy.) A true copy. Nov. 18, 1884. J. B. Curry, notary public, N. Y. Co.

65 Copy.

Cargo. No. 7265.

The Greenwich Insurance Company of the City of New York, by this policy of insurance on account of Inman, Swann and Company, do make insurance and cause the several persons hereon endorsed to be insured upon all kinds of lawful goods, wares, merchandise, and produce laden on board the good vessel or vessels, boat or boats, railroad or carriage, lost or not lost, at and from ports and places to ports and places on a lawful and regular route and voyage for the several amounts and at the rates as herein endorsed, subject to the conditions of this policy or of any contract proposition covered by this policy, according to their true intent and meaning.

Beginning the adventure upon the said property from and immediately following the loading thereof at the port or place named in the endorsement, and so shall continue and endure until the same shall arrive and be safely landed at the port of destination, and not to exceed forty-eight hours from the time of arrival.

66 Touching the adventures and perils which this company is contented to bear and take upon itself, they are of the lakes, rivers, canals, railroads, fires, jettisons, and all other perils and misfortunes that have or shall come to the hurt, detriment, or damage of the said property or any part thereof, excepting all perils, losses, or misfortunes arising from the want of ordinary care and skill in loading and stowing the cargo of or in navigating the said vessel; from theft, barratry, or robbery or other legally excluded causes;

and in case of loss or misfortune it shall be lawful and necessary to and for the insured or insurers, their agents, factors, servants, and assigns, to sue, labor, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandise or any part thereof without prejudice to this insurance; nor shall the acts of the insured or insurers in recovering, saving, and preserving the property insured in case of disaster be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned without prejudice to the rights of either party;

67 to the charges whereof this company will contribute in such proportion as the sum herein insured bears to the whole value of the property so insured. Moneys and bullion, promissory notes and other evidences of debt, books of account, written securities, deeds, or other evidences of title to property of any kind are not covered by this policy unless expressly defined as so insured.

And in case of loss such loss to be paid sixty days after proof of loss and proof of interest in said property are furnished this company: Provided always, and it is hereby further agreed, That if the said insured shall have made any other insurance upon the property aforesaid prior in date of this policy, then this company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured, and this company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from; and in case of any insurance upon the said property subsequent in date to this policy this company shall, nevertheless, be answerable for the full extent of the sum by them subscribed hereto

68 without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent insurance had been made; and in case of loss or damage to the property hereby insured this company shall have prompt notice of same, and shall have every opportunity and facility for ascertaining the cause, extent, and amount of damage by personal inspection, appraisal, or sale of the damaged property. It is also agreed that the property be warranted by the insured free from any charge, damage, or loss which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade or any trade in articles contraband of war. It is furthermore hereby expressly provided that no suit or action against this company for the recovery of any claim for loss or damage upon, under, or by virtue of this policy shall be sustained in any court of law or equity unless such suit or action shall be commenced within the term of twelve months next after the loss or damage occur; and in case any such suit or action shall be commenced after the expiration of twelve months next after such loss or damage shall have occurred the lapse of time shall be taken and deemed as conclusive evidence and a conclusive defence against the validity of the claim thereby so attempted to be enforced.

69 It is also agreed and understood that in case of loss or damage under this policy the assured in accepting payment therefor hereby and by that act assigns and transfers to this company all his or their right to claim for loss or damage as against the carrier or other person or persons, to inure to its benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by this company, and any act of the insured waiving or transferring or tending to defeat or decrease any such claim against the carrier or such other person or persons, whether before or after the insurance was made under this policy, shall be a cancellation of the liability of this company for or on account of the risk insured for which loss is claimed.

And it is understood and agreed that this company or their agent shall have free access at all reasonable hours to the books, accounts, instructions, and correspondence of the assured containing statements of or which relate to shipments and receipts covered by this policy; and this policy may be declared void by either party on giving a written notice to that effect to the other party, but without prejudice to any shipment or liability made or incurred prior to the service of such notice.

70 It is agreed that the person or persons, if any other than the assured, who have procured this insurance to be taken by this company shall be deemed the agent or agents of the assured, and not of this company, in any transactions relating to this insurance, and if the premium on this policy shall be paid to any person or persons other than the duly appointed and authorized agent of this company such payment shall be at the sole risk of the assured.

Deck cargoes.—It is understood that property covered by this policy on lake vessels shall be under deck, unless otherwise specified and charged for additionally in the endorsement hereon, and deck cargoes are insured against total loss of packages only. The minimum rates of such loss to make a claim shall be ten per cent., except salt, which shall be twenty per cent., of the whole number of packages insured on deck, and in all cases on deck risks to be free from damage by wet, breakage, leakage, or exposure.

Warranted by the insured free from any claim for loss or damage arising from seizure, detention, or the consequences of any hostile act of the United States Government, or of the people of any

71 seceding or revolting State of this Union, or from the acts of parties sympathizing with or acting for or with such State or the inhabitants thereof, or from any loss or damage from piracy or letter of marque, or of the acts of any government hostile to the United States, and also from any neglect of or deviation from the navigation or other laws or regulations of the United States, or of any State through any part of which the property covered by this policy shall pass.

Warranted by the insured free from damage or injury from dampness or frost, heating, sweating, steaming, change of flavor, or being spotted, discolored, musty, or mouldy, except caused by actual water contact with the article damaged, and to be free from liability for leakage on molasses or other liquids or breakage of articles liable to

break from their nature, unless occasioned by the perils insured against.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination.

This policy is subject to the usages and regulations of the ports of Buffalo, St. Louis, or New York in all matters of adjustment and settlement of losses and averages not herein otherwise clearly specified and provided for, as may be stated by a competent dis-
72 interested adjuster of marine losses, to be designated by the insurers, but no damage to be paid unless amounting to five per cent.

In witness whereof the Greenwich Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of New York, the sixth day of September, one thousand eight hundred and eighty-three.

(Signed) S. C. HARRIOT, *President.*
Attested: (Signed) M. A. STONE, *Secretary.*

Memorandum of Risks Taken on Account of the Within Policy.

Date, 1883, Aug. 29.
By whom obtained, —— ——.
Name of vessel, ——.
From August 29th, 1883.
To August 29th, 1884.
Amount insured, $6,666.67.
Rate, 4%.
Premium, $266.66.
Description of property insured and remarks: Sixty-six hundred and sixty-six and $\frac{67}{100}$ dollars ($6,666.67), @ 4%, $266.66.

73 Inman, Swann & Co. for account whom it may concern:

$20,000 on cotton from points of shipment in the United States to New York and from New York to places in the United States by railroads, ferry-boats, and lighters, covering any and all the risks of fire and inland navigation and transportation while in transit from and to said points; also on any vessel or lighter in the harbor or bay of New York, and also not to exceed $2,500 on any one steamer from New York to ports in the New England States and to places on the Hudson river and thence by railroad to inland places; and it is understood and agreed that this policy covers said cotton, for a period not to exceed 10 days, while in railroad depots and sheds or warehouses, streets, or yards and on dock awaiting shipment, and also, for a like period, while on dock, in warehouses, and in railroad depots and sheds or on street or in yards after arrival at destination before removal by consignee or consignees.

The total amount of each and every loss, less $150 to be deducted in lieu of average, shall be paid within thirty days after receipt of proofs of loss, any and all clauses in the printed part of this policy to the contrary notwithstanding.

In event of loss the assured agrees to subrogate to the in-
74 surers all their claims against the transporters of said cotton, not exceeding the amount paid by said insurers.

And it is agreed that if at the happening of any casualty that the insured have any other insurance covering the cotton hereby insured, then such insurance shall contribute with this insurance *pro rata* as to their respective amounts.

It is also agreed that in the event of loss the assured agree to pay the insurers additional premium or premiums at the rate of 4% on the amount of such loss or losses, and this policy is thereby to be reinstated and in force to the full amount of $20,000, unless either party desire the cancelment of same.

Other insurance permitted 12 mos. from Aug. 29, '83.

Loss, if any, payable to Inman, Swann and Company.

This policy to be liable only to the extent of $6,666.67, being $\frac{1}{3}$ part, as specified above.

Attached to policy No. 7265, Greenwich Ins. Co.

Prem., $266.66.

From Frank & Du Bois, 45 & 47 William St., N. Y.

[Written on the margin:] In the event of loss, damage, detriment or hurt to said cotton it shall be the duty of the assured to use all lawful and proper efforts for the safeguard and recovery of the property without prejudice to this insurance, and this company will contribute to the just and reasonable charges thereof in proportion as the sum named in this policy bears to the whole amount of insurance to be kept on said property.

75 Frank & Du Bois, fire, marine, and railroad insurance, 45 & 47 William street.

NEW YORK, *Nov. 17th*, 1883.

To Inman, Swann & Co.:

In accordance with the provision of this policy the estimated loss sustained by this company of $3,667 in consequence of fire at Charleston, S. C., about Oct. 29th, '83, is hereby reinstated, and $114.30 additional premium is charged by this company therefore, it being understood and agreed that when the above loss is finally adjusted the amount reinstated and the premium charged shall be made correct.

Attached to policy No. 7265.

GREENWICH INS. CO.,
M. A. STONE, *Sec'y*.

76 (Endorsed:) No. 7265. Cargo policy. The Greenwich Insurance Company (capital, $200,000), No. 161 Broadway, New York. Inman, Swann and Co. Amount insured, $6,666.67; rate, 4%; premium, $266.66. Frank & Du Bois. * * * U. S. circuit court, dist. of South Carolina. Wm. H. Inman *et al. vs.* The S. Carolina R. R. (Copy.) Defendant's Exhibit B. Nov. 18, 1884. A true copy. J. B. Currey, notary public, N. Y. Co.

77 Frank & Du Bois, fire, marine, and railroad insurance, 45 & 47 William Street.

NEW YORK, *Nov.* 17, 1883.

To Inman, Swann & Co.:

In accordance with the provision of this policy the estimated loss sustained by this company of $3,667 in consequence of fire at Charleston, S. C., about Oct. 29th, '83, is hereby reinstated, and $114.90 additional premium is charged by this company therefore, it being understood and agreed that when the above loss is finally adjusted the amount reinstated and the premium charged shall be made correct.

Attached to policy 21773.

PHENIX INS. CO.
PHENIX INS. CO.,
By W. L. MOLYNEAUX,
Per W. S.

78 Inman, Swan & Co. for account whom it may concern:

$20,000 on cotton from points of shipment in the United States to New York and from New York to places in the United States by railroads, ferry-boats, and lighters, covering any and all the risks of fire and inland navigation and transportation while in transit from and to said points; also on any vessel or lighter in the harbor or bay of New York, and also not to exceed $2,500 on any one steamer from New York to ports in the New England States and to places on the Hudson river and thence by railroad to inland places; and it is understood and agreed that this policy covers said cotton, for a period not to exceed 10 days, while in railroad depots and sheds or warehouses, streets, or yards and on dock awaiting shipment, and also, for a like period, while on dock, in warehouses, and in railroad depots and sheds or on streets or in yards after arrival at destination before removal by consignee or consignees.

The total amount of each and every loss, less $150 to be deducted in lieu of average, shall be paid within thirty days after receipt of proofs of loss, and any and all clauses in the printed part of this policy to the contrary notwithstanding.

79 In event of loss the assured agrees to subrogate to the insurers all their claims against the transporters of said cotton, not exceeding the amount paid by said insurers.

And it is agreed that if at the happening of any casualty that the insured have any other insurance covering the cotton hereby insured, then such insurance shall contribute with this insurance *pro rata* as to their respective amounts.

It is also agreed that in the event of loss the assured agree to pay the insurers additional premium or premiums at the rate of 4% on the amount of such loss or losses, and this policy is thereby to be reinstated and in force to the full amount of $20,000.00, unless either party desire the cancelment of same.

Other insurance permitted 12 mos. from Aug. 29, '83.

Loss, if any, payable to Inman, Swann & Co.

This policy to be liable only to the extent of $6,666.67, being ⅓d part, as specified above.

Attached to policy No. 21773, Phenix Ins. Co.

$6,666.67, @ 4% net, $266.67.

From Frank & Du Bois, 45 & 47 William St., N. Y.

[Written on the margin:] In the event of loss, damage, detriment, or hurt to said cotton it shall be the duty of the assured to use all lawful and proper efforts for the safeguard and recovery of the property without prejudice to this insurance, and this company will contribute to the just and reasonable charges thereof in proportion as the sum named in this policy bears to the whole amount of insurance to be kept on said property.

[Written across the face:] Copy.

80 Cargo. 26364. No. 21773.

By the Phenix Insurance Company, on account of —— ——, in case of loss to be paid as per form attached upon all kinds of lawful goods and merchandise laden or to be laden on board the good R. R., &c., as per form attached, whereof —— —— is master for this present voyage, or whoever else shall go as master in the said vessel, or by whatever other name or names the said vessel or the master thereof is or shall be named or called.

Sum insured $6,666.67.

Beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board the said vessel at —— aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at —— aforesaid; and it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said goods and merchandises hereby insured are valued (premium included) at ——.

Touching the adventures and perils which the said Phenix Insurance Company is contented to bear and take upon itself in
81 this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, or people, of what nation, condition, or quality soever (except as hereinafter provided for on the margin of this policy), barratry of the master and mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises or any part thereof; and in case of loss or misfortune it shall be lawful and necessary to and for the assured, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises or any part thereof without prejudice to this insurance; nor shall the acts of the insured or insurers in

recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof the said insurance company will contribute according to the rate and quantity of the sum herein insured, having been paid the consideration for this insurance by the assured or their assigns at and after the rate of 4% net.

82 And in case of loss such loss to be paid in thirty days after proof of loss and proof of interest in the said cotton (the amount of the note given for the premium, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid unless amounting to five per cent.: Provided always, and it is hereby further agreed, That if the said assured shall have made any other assurance upon the premises aforesaid prior in date to this policy, then the said Phenix Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Phenix Insurance Company shall return the premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from; and in case of any insurance upon the said premises subsequent in date to this policy the said Phenix Insurance Company shall, nevertheless, be answerable for the full extent of the sum by them subscribed hereto without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received in the same

83 manner as if no such subsequent assurance had been made.

It is also agreed that the property be warranted by the assured free from any charge, damage, or loss which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade or any trade in articles contraband of war.

In case of any agreement or act, past or future, by the insured whereby any right of recovery of the insured against any persons or corporations is released or lost which would on acceptance of abandonment or payment of loss by this company belong to this company but for such agreement or act, or in case this insurance is made for the benefit of any carrier or bailee of the property insured other than the person named as insured, the company shall not be bound to pay any loss, but its right to retain or recover the premium shall not be affected.

Warranted not to abandon in case of capture, seizure, or detention until after condemnation of the property insured, nor until ninety days after notice of said condemnation is given to this company; also warranted not to abandon in case of blockade, but in the event of blockade to be at liberty to proceed to an open port and there end the voyage.

In witness whereof the president or vice-president of the

84 said Phenix Insurance Company hath hereunto subscribed his name and the sum insured and caused the same to be attested by their secretary, in New York, the 29 day of Aug., one thousand eight hundred and eighty-three.

MEMORANDUM.—It is also agreed that bar, bundle, rod, hoop, and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wicker-

ware, and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, rags, hempen yarn, bags, cotton bagging and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting, and cassia, except in boxes, free from average under twenty per cent., unless general; and sugar, flax, flaxseed, and bread are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice free from average under ten per cent., unless general.

Premium, $266.67.

85 Warranted not to load more than her registered tonnage with salt, guano, lead, marble, coal, or iron on any one passage; also warranted not — carry grain in bulk, except from the ports of New York, Philadelphia, or Baltimore, and in all cases not to exceed one-half the registered tonnage, and the loading to be under the inspection of a surveyor appointed by the board of underwriters or by this company for that purpose. The vessel is not to proceed to sea with grain in bags or bulk on board without a certificate from such inspector that the vessel is properly laden and fitted for her intended voyage.

In case of loss or damage to any part of a machine consisting, when complete for sale or use, of several parts, the insurers shall only be liable for the insured value of the part lost or damaged.

Warranted by the insured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea-water with the articles damaged occasioned by sea perils. In case of partial loss by sea, damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged and not otherwise, and the same practice shall obtain as to all other merchandise as far as practicable. Not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

86

If the voyage aforesaid shall have begun and shall have terminated before the date of this policy then there shall be no return of premium on account of such termination of the voyage.

In all cases of return of premium, in whole or in part, one-half per cent. upon the sum insured is to be retained by the assurers, $6,666.67, six thousand six hundred & sixty-six $\frac{67}{100}$ dollars.

[On margin:] Warranted by the assured free from any claim for loss, damage, or expense arising from seizure, capture, detention, their consequences or the consequences of any hostile act, whether lawful or unlawful, of any government, governments, or seceded States, or by unauthorized or lawless persons therein or otherwise,

and whether occurring in a port of distress or otherwise, anything in this policy to the contrary notwithstanding.

STEPHEN CROWELL, *President.*
W. L. MOLYNEAUX, *Secretary.*
Per M.

87 (Endorsed:) Aug. 29, '83. 21773. Phenix Insurance Company. Inman, Swan & Co. Aug. 29, '83, to Aug. 29, '84. Cargo, per R. R'd, ferry-boats, & lighters. $6,666.67, @ 4 per cent., $266.67. Record, 11 folio. Frank & Du Bois. Copy. U. S. circuit court, dist. of South Carolina. Wm. H. Inman *et al. vs.* The S. Carolina R. R. Defendant's Exhibit "C." (Copy.) A true copy. Nov. 18, 1884. J. B. Currey, notary public, N. Y. Co.

88 Frank & Du Bois, fire, marine, and railroad insurance, 45 & 47 William street.

NEW YORK, *Dec. 1st*, 1883.

It is hereby understood and agreed by the undersigned companies, insuring Messrs. Inman, Swann & Co., that proofs of loss *of* fire at Charleston, S. C., of Oct. 29th, '83, presented this day are to be considered as if filed on Nov. 17th, as all papers and vouchers to prove such loss were forward- by Messrs. Inman, Swann & Co., with their consent, to the South Carolina R. R. Co. to collect loss from them as common carriers, which, however, is not to prejudice Messrs. Inman, Swann & Co.'s claim against the undersigned ins. Co.'s.

No. 3556. MECHANICS' & TRADERS' INS. CO.,
A. T. KINGMAN, *Agent.*
No. 7265. GREENWICH INS. CO.,
M. A. STONE, *Sec'y.*
No. 21773. PHENIX INS. CO.,
W. L. MOLYNEAUX.

89 (Endorsed:) U. S. circuit court, dist. of South Carolina. Wm. H. Inman *et al. vs.* The S. Carolina R. R. Defendant's Exhibit "D." A true copy. Nov. 18, 1884. J. B. Currey, notary public, N. Y. Co.

Frank & Du Bois, fire, marine, and railroad insurance, 45 & 47 William street.

NEW YORK, *Jan. 18th*, 1884.

The undersigned companies having been notified by Messrs. Inman, Swann & Co. of loss by fire at Charleston, S. C., on or about Oct. 29th, '83, and proofs of loss having been presented to the South Carolina R. R. Co. direct on November the 17th, '83, with consent of said insurance companies, which, however, it was agreed
90 upon should not prejudice the assurer's claim against them, the claims having been agreed upon as filed with the insurance companies on said Nov. 17th, in case the railroad should refuse to pay and the claim being due on January 17th, '84, Messrs.

Inman, Swann & Co. will still use every effort to collect the claim direct, and the undersigned insurance Co's hereby agree to pay them (six) 6% interest from Jan'y 17th, '84, to the time when claim is collected. This agreement, however, is not to prejudice their claim against the undersigned insurance companies.

No. 3556. MECHANICS' & TRADERS' INS. CO.,
A. T. KINGMAN, *Agent.*

No. 7265. GREENWICH INS. CO.,
M. A. STONE, *Sec'y.*

No. 21773. PHENIX INS. CO.,
W. L. MOLYNEAUX.

(Endorsed:) U. S. circuit court, dist. of South Carolina. Wm. H. Inman *et al. vs.* The S. Carolina R. R. Defendant's Exhibit "E." Nov. 18, 1884. A true copy. J. B. Currey, notary public, N. Y. Co.

91′ UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, Jonathan B. Currey, a notary public in and for the city, county, and State of New York, do hereby certify that the reason for taking the foregoing deposition is that the said witness lives at a greater distance from the place of trial than one hundred miles, and that annexed hereto is the notice given the adverse party.

I further certify that on the 18th day of November, 1884, I was attended at my office, No. 16 Exchange Place, in said city of New York, by George A. Black, attorney for the plaintiffs on said examination, and by Horace Barnard, attorney for the defendant on said examination, and by the said witness, Bernard S. Clark.

That the said witness was by me cautioned and sworn to testify the whole truth and carefully examined; that his testimony was taken by a stenographer and reduced to writing pursuant to the stipulation hereto annexed and thereafter subscribed by the said witness in my presence; that I am not of counsel or attorney
92 to either of the parties nor in any way interested in the event of the cause named in said caption.

In witness whereof I have hereunto set my hand and official seat, at the city of New York, this 18th day of November, 1884.

[SEAL.] J. B. CURREY,
Notary Public, # 158, *N. Y. Co.*

Notary's & stenographer's fees, $30.

J. B. CURREY, *N. P.*

In the Circuit Court of the United States, District of South Carolina.

WILLIAM H. INMAN, JOHN H. INMAN, JAMES SWANN, BERNARD S. Clark, and Robert W. Inman, Citizens of the State of New York, Copartners Trading under the Firm Name of Inman, Swann & Co., Plaintiffs,

against

THE SOUTH CAROLINA RAILWAY COMPANY, a Body Corporate under the Laws of South Carolina, Defendant.

93 After hearing the testimony, argument was made by Mr. Nathans on behalf of the plaintiffs and by Messrs. Simonton and Barker on behalf of the defendant, and the plaintiffs, by their attorney, Mr. Nathans, prayed the court to instruct the jury; and the defendant, by its attorneys, Messrs. Simonton and Barker, also prayed the court to instruct the jury, which instructions and bill of exceptions are in the words and tenor following:

Plaintiffs' Bill of Exceptions.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

WILLIAM H. INMAN, JOHN H. INMAN, JAMES SWANN, BERNARD S. Clark, and Robert W. Inman, Citizens of the State of New York, and Copartners in Trade under the Firm Name of Inman, Swann, & Company, Plaintiffs,

against

THE SOUTH CAROLINA RAILWAY COMPANY, a Corporation Cre-
94 ated under the Laws of South Carolina, Defendant.

The issues in said action came on for trial before the honorable the judges of the circuit court of the United States for the district of South Carolina.

A jury was called and sworn.

The plaintiffs, to maintain the issue on their part, examined Bernard S. Clark, who proved the delivery of the cotton to the Greenville and Columbia railroad to be carried to plaintiffs at New York, the receipt of the cotton by the defendant as a connecting carrier, its destruction by fire at Charleston on the twenty-ninth day of October, A. D. 1883, while in the custody of the defendant, awaiting delivery to the next connecting carrier, and that the value of said cotton, less freight, — $10,717.21; that the form of the bills of lading given to the agent of plaintiff by the Greenville and Columbia Railroad Company, the first carrier, was as follows:

Piedmont Air Line.

Bill of Lading.

LAURENS, *Oct.* 18, 1883.

95 Received of W. H. Stapleton — bales of cotton, marked, numbered, and weighing as below, to be transported by Co-

lumbia and Greenville Railroad Company and connecting lines and steamships (with liberty to compress) unto order notify Inman, Swann & Company, at New York, upon payment of 74 — per 100 lbs., as per bale, freight, and upon the following conditions, viz:

Neither the Columbia and Greenville Railroad Company, the companies constituting the through line, nor any one of them, will be responsible for any loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, or any usurped civil or military authority, storage, the effect of heat and cold, dampness, rust, loss, and weight, mending, whether the cotton be in actual transit or be waiting shipment or delivery or be in depose at stations, on wharves, or at sea, or in port, or in cars, boat, vessel or steamer.

Neither the Columbia & Greenville Railroad Company nor any of the railroad or steamship companies over which the cotton shall pass will be responsible for any loss, damage, or detention
96 arising from fire after delivery of said cotton to any vessel, steamship, steamship company, or other water carrier, whether such fire occurs on board such vessel or steamship or while in the custody or possession of any steamship company or other water carrier awaiting transhipment or delivery.

It is further understood and agreed between the parties hereto that the railroad company above mentioned or any railroad, steamship company, or other water carrier by whom this cotton may be transported, will not be responsible for any loss, damage, or delay caused by accident or damage to machinery, collision, ice, storm, shipwreck, or any other accident of the seas, bays, or rivers, as they assume no marine risk whatever; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made, in writing, within twenty-four hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination.

And it is further stipulated and agreed that in case of any
97 loss or damage done to or sustained by any cotton herein receipted for during transportation, whereby any legal liability may be incurred by the terms of this contract, that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton. The delivery by any navigation company, where it is the last carrier, shall be at its wharf, and, at its option, — not removed during the day of their arrival, they may be stored at owner's expense or risk or permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, to tow barges and lighters, laden or unladen, and to transfer to lighters or to any other steamship or vessel, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk *at* expense

of the owner. Loss or damage claims for cotton carried under
98 this bill of lading will be settled only on basis of weights entered hereon.

No. of bales.	Marks.	Weights.
——.	——.	——.

In witness whereof the agent hath affirmed to one bill of lading.
(Signed) J. H. BOWNY.

Upon cross-examination by defendant the witness testified that plaintiffs had open policies of insurance in the Phenix, Traders' & Merchants', and Greenwich Insurance Companies.

Q. Has the firm of Inman, Swann & Company received any indemnity for the loss occasioned by the burning of the cotton mentioned in this matter?
A. We have not.
Q. Has the firm of Inman, Swann & Company received any indemnity?
A. No, sir.
Q. Has any one for it—for that firm?
A. No, sir.
Q. Have you any agreement with either of the insurance companies mentioned before in relation to this loss on this cotton other than is expressed on the face of their respective policies?
A. We have.
Q. Is it in writing?
99 A. It is.
Q. Will you produce it?
A. I produce them.

The agreements are as follows and were made after the fire and before suit:

Frank & Du Bois, fire, marine, & railroad insurance, 45 & 47 William street.

NEW YORK, *Nov.* 17, 1883.

To Inman, Swann & Co.:

In accordance with the provision of this policy the estimated loss sustained by this company of $3,667.00 in consequence of fire at Charleston, S. C., about Oct. 29th, '83, is hereby reinstated and $114.90 additional premium is charged by this company therefor, it being fully understood and agreed that when the above loss is finally adjusted the amount reinstated and the premium charged shall be made correct.

Attached to this policy, 21773.

PHENIX INS. CO.
PHENIX INS. CO.,
By W. L. MOLYNEAUX,
Per W. S.

100 Frank & Du Bois, fire, marine, and railroad insurance, 45 & 47 William street.

NEW YORK, *Dec.* 1*st*, 1883.

It is hereby understood and agreed by the undersigned companies insuring Messrs. Inman, Swann & Co. that proofs of loss *of* fire at Charleston, S. C., of Oct. 29th, 1883, presented this day, are to be considered as filed on November 17th, as all papers and vouchers to prove such loss were forwarded by Messrs. Inman, Swann & Co., with their consent, to the South Carolina R. R. Co. to collect loss from them as common carriers, which, however, is not to prejudice Messrs. Inman, Swann & Co.'s claim against the undersigned ins. Co's.

No. 3556. MECHANICS' & TRADERS' INS. CO.,
A. T. KINGMAN, *Agent.*
No. 7265. GREENWICH INS. CO.,
M. A. STONE, *Sec't'y.*
No. 2173. PHENIX INS. CO.,
W. L. M., *M'g'r.*

Frank & Du Bois, fire, marine, and railroad insurance, 45 & 47 William St.

NEW YORK, *Jan.* 18*th*, 1884.

101 The undersigned companies having been notified by Messrs. Inman, Swann & Co. of loss by fire at Charleston, S. C., on or about Oct. 29th, '83, and proofs of loss having been presented to the South Carolina R. R. Co. direct on Nov. 17, '83, with consent of said insurance companies, which, however, it was agreed upon should not prejudice the assurer's claim against them, the claims having been agreed upon as filed with insurance companies on said Nov. 17th, in case the railroad should refuse to pay, and the claim being due on Jan. 17th, 1884, Messrs. Inman, Swann & Co. will still use every effort to collect the claim direct, and the undersigned insurance companies hereby agree to pay them (six) 6% interest from January 17th, '84, to the time when claim is collected. This agreement, however, is not to prejudice their claim against the undersigned insurance companies:

No. 3556. MECHANICS' & TRADERS' INS. CO.,
A. T. KINGMAN, *Ag't.*
No. 7265. GREENWICH INS. CO.,
M. A. STONE, *Sec'y.*
No. 21773. PHENIXINS. CO.,
W. L. M., *M'g'r.*

Question. Do you not wish to modify your statement in regard to the receipt by Inman, Swann & Co. of any indemnity for the loss occasioned by the burning of the cotton? The question
102 that I asked you before was, "Has the firm of Inman, Swann & Co. received any indemnity for the loss occasioned by the burning of the cotton mentioned in this matter?" and you answered that you had not. Now, do you wish to modify that statement?

Answer. No. I don't think there was any indemnity at all. Nothing indemnifies me but money.

Q. Do you know what and by whom instructions to bring the suit were given, if any?

A. They were given by me.

Q. Were they in writing; are they in your possession, and will you produce them?

A. My recollection is that the instructions were given in the form of a telegram.

Q. You have not got it?

A. No, sir.

Q. Addressed to whom, was it?

A. Addressed to Mr. Gallgher, in Charleston, South Carolina.

Q. What was Mr. Gallagher's business?

A. I believe he was an adjuster of averages—an insurance man.

Q. Was there any other agreement with the insurance companies or either of them in relation to the bringing of this suit?

A. No, sir.

103 Q. No agreement as to who should pay the costs and expenses of the same?

A. There was no agreement except in this wise: That Mr. Gallagher said to me there would be no expense to us.

Q. What, if any, was Mr. Gallagher's connection with this matter?

A. He was introduced to me at first by our insurance brokers as one who had several cases growing out of this loss by this fire; he wanted our case.

Q. Did he say whom he wanted it for?

A. He had a lot of other cases he said and wish- to represent them all.

Q. In your conversation with him relating to your claim did Mr. Gallagher ever mention the insurance companies who issued policies, marked Defendant's Exhibits A, B, & C, to you?

A. No, sir.

Q. (Repeated.)

A. I don't think he mentioned the companies by name.

Q. Did he represent himself to be their agent?

A. No; he did not.

Q. Were you in any way informed that he was their agent?

A. I was not.

104 Q. When Mr. Gallagher told you that you would be at no expense in the matter did he say who would pay it?

A. He did not.

Q. Did you put any faith in his assurance that you would not be at expense in the matter?

A. I put faith in it; I am the one who had all to do with this thing, anyhow.

Q. Why did you put faith in it?

A. Because I believed I could depend upon what he said.

Q. Do you not know that Mr. Gallagher represented the insurance companies issuing Defendant's — A, B, & C (policies)?

A. I did not know it.

Q. Have you any reason to believe so?

A. I am rather inclined to think he did and does now.

Q. You have had the entire management of this whole matter you say, haven't you?

A. Yes, sir; I have.

Q. And what do you understand the arrangement with the insurance companies or their agent to be in relation to this suit?

A. By our policies, in case of loss, we have to pay four per cent. on that loss, to keep our policy good, for twenty thousand dollars, all the time. My object is to get this money from the railroad
105 companies and save this four per cent.; and $150.00 average comes in there, and in case I don't get it from them to fall back on my insurers—the insurance companies—and make them pay it. That is the exact reason, and if I don't get it from them the idea is that I will fall back on the insurance company.

Q. (Repeated.)

A. Under that the insurers are to pay my loss in case I am unsuccessful in getting it from the railroad company.

Q. (Repeated.)

A. Well, I am inclined to believe that Mr. Gallagher may have some arrangement with the companies, but it is all guess-work in regard to that arrangement.

Q. Have you never had any direct communication with either of these companies or officers of them in regard to this matter?

A. I have not.

Q. Do you know whether the firm of Inman, Swann & Co. has borrowed any money from either the Phenix, Mechanics' & Traders', or the Greenwich company since Dec. 1st, 1883?

A. They never borrowed a dollar, prior or after, from any of them.

106 Q. Has your firm agreed to wait and not to present its claim on the insurers under the policies insured until after it shall have tried to collect its claim from the railroad company, the defendants here in this suit?

A. We have not. These are the only agreements (indicating defendants' exhibits of December 1st, 1883, and January 18, 1884).

Q. Your costs and expenses, don't you expect to get them back?

A. I expect Gallagher will look after that.

Q. Do you know whether any part of these expenses have been paid, and by whom, if you know?

A. Of course I don't know anything about that.

Q. Your firm, has it paid or agreed to pay any of the expenses of this suit?

A. It has not.

Q. Did you or your firm employ any counsel for plaintiff in this suit?

A. We authorized Mr. Gallagher to bring suit.

Q. (Repeated.)

A. No; not personally.

Q. Was not your authority to Mr. Gallagher merely to use your names as plaintiffs in this suit?

A. His authority was to bring suit in our name if he failed to collect from the railroad.

On redirect examination witness testified that plaintiffs were the owners of the cotton, and did not authorize agent to take bill
107 of lading with insurance clause.

Q. You have made your claim on the railroad company, the defendant, under the bill of lading contrary to that clause, haven't you?

A. We have.

Q. You have received the balance of cotton and settled the freight with def'ts under the same bill of lading, have you not?

A. We received the balance of the cotton and settled for the freight on the same under the same bill of lading.

Q. You were the owner at the time of shipment, you say. Your agent at the time of shipment accepted that bill of lading, did he not?

A. He did.

Q. He had authority to accept bills of lading, didn't he?

A. Yes.

Q. Your agent had authority to accept these bills of lading for you, had he not?

A. He had authority to take bills of lading for the cotton, but had to accept what the company would give him or no bill of lading.

108 The policy issued to plaintiffs on cotton burned by the Mechanics' and Traders' Ins. Co. bears date 7th Sept., 1883, and contains the following provisions:

"It is also agreed and understood that in case of loss or damage under this policy the assured in accepting payment therefor hereby and by that act assigns and transfers to the said insurance company all his or their right to claim for loss or damage as against the carrier or other person or persons, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by the said insurance company; and any act of the insured waiving or transferring or
109 tending to defeat or decrease any such claim against the carrier or such other person or persons, whether before or after the insurance was made under this policy, shall be a cancellation of the liability of the said insurance company for — on account of the risk insured for which loss is claimed. * * * In the event of loss the assured agreed to subrogate to the insurers all their claims against the transporters of said cotton, not exceeding the amount paid by said insurers."

Similar provisions are contained in the policy issued by the Greenwich Company to the plaintiffs on cotton destroyed. The policy issued by the Phenix Ins. Co. on said cotton contained the following provision: "In case of any agreement or act, past or future, by the insured whereby any right of recovery of the insured against any persons or corporations is released or lost, which would, on acceptance of abandonment or payment of loss by this company, — belonged

to this company but for such agreement or act; or, in case this insurance is made for the benefit of any carrier or bailee of the property insured other than the person named as insured, the company shall not be bound to pay any loss, but its right to
110 retain or recover the premium shall not be affected;" also the further provision, "that in the event of loss the insured agree to subrogate to the insurers all their claims against the transporters of said cotton, not exceeding the amount paid by said insurers."

Plaintiffs then rested their case. The defendant offered no testimony and asked the court to direct a verdict for the defendant under the following instruction submitted by its attorneys, Simonton & Barker.

First.

That the bill or bills of lading under which the cotton of plaintiffs in this case was transported by the defendant constituted the contract of the parties, and the plaintiffs are bound by the stipulation that the defendant company "shall have the benefit of any insurance that may have been effected upon or on account of said cotton."

Second.

That the plaintiffs, before they can recover against defendant here, must show that they have performed their part of this contract by proving that they have given to the South Carolina Rail-
111 way Co. the benefit of the insurance, or that they have been ready to perform their contract by tendering such benefit, and that the same has been refused.

Third.

That if the jury find that an agreement was made between plaintiffs and their insurers by which the insurers waived proofs of loss and admitted the claim of plaintiffs to be due by them on the 1st of January, 1884, and plaintiffs agreed to give time upon said claim to the insurers and meantime to press the claim for the cotton against the South Carolina Railway Company, defendant, in consideration of the payment to plaintiffs by their insurers of 6% interest per annum on said admitted claim from 1st January, 1884, then plaintiffs cannot recover, and verdict must be for defendant.

Fourth.

Unless the jury finds that the loss occurred from the fraud or negligence of the defendant company they must find for the defendant.

Fifth.

That before the jury can find that the loss occurred from
112 the negligence of the company they must find that the loss occurred from the failure of the company to take some precaution or to do some act which was reasonable and proper under the circumstances.

The plaintiffs' attorney then prayed the court to instruct the jury—

First.

That the stipulations in the bills of lading giving the defendant the benefit of insurance effected by the plaintiffs is unreasonable, contrary to public policy, and the duties and obligations imposed by law upon carriers, and therefore void.

But the court refused said instruction, and plaintiffs, then and there and before the jury had withdrawn from the bar, did except to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

And plaintiffs prayed the court to instruct the jury—

Second.

That if the stipulation in the bills of lading under which the cotton of the plaintiffs was to be transported by the defendant
113 giving to the carrier the benefit of insurance is valid, then such stipulation only entitles the defendant to such insurance upon payment by it of plaintiffs' lost, unless the plaintiffs have already been paid by the insurer.

But the court refused said instruction, and plaintiffs, then and there and before the jury had withdrawn from the bar, did except to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

Third.

That if the stipulation in the bills of lading under which plaintiffs' cotton was to be transported *be* the defendant giving to the carrier the benefit of plaintiffs' insurance is valid, then such stipulation only entitles the defendant to such insurance as it is in the hands of the plaintiffs, and if the policy is void or unproductive this is no defence, and the plaintiffs are entitled to recover in this action.

But the court refused said instruction, and plaintiffs, then
114 and there and before the jury had withdrawn from the bar, did except to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

Fourth.

That if the stipulation in the bills of lading under which plaintiffs' cotton was to be transported by the defendant giving the carrier benefit of insurance effected by plaintiffs is valid, then no legal obligation arose therefrom that the plaintiffs should effect

valid insurance, and if such insurance is invalid this is no defense to plaintiffs' action.

But the court refused said instruction, and plaintiffs, then and there and before the jury had withdrawn from the bar, did except to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

Fifth.

That as the plaintiffs under the stipulation in the bills
115 of lading giving the carrier benefit of the insurance may or may not have insured as they please, the defendant takes such insurance if effected subject to all infirmities, and the same constitutes no defence to plaintiffs' action.

But the court refused said instruction, and plaintiffs, then and there and before the jury had withdrawn from the bar, did except to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

Sixth.

That the carrier does not lose his character as carrier by reason of a stipulation giving him the benefit of insurance by the shipper or owner, and that as carrier he is primarily liable for loss or damage, if not arising from causes exempted by law or his contract, and if the defendant desires the benefit of plaintiffs' insurance it must first pay the loss sustained by them.

But the court refused said instruction, and plaintiffs, then
116 and there and before the jury had withdrawn from the bar, did except to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

Seventh.

That the defendants, under the bills of lading in question and not exempt from loss by fire as such exemption under said bills of lading, only apply to the carrier by water.

But the court refused said instruction, and plaintiffs, then and there and before the jury had withdrawn from the bar, did except to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

Before the court ruled upon the instructions asked for by plaintiffs the defendant's counsel asked leave to withdraw their fourth and fifth instructions, which was granted by the court, and
117 whereupon the court, in lieu of the instructions asked for by plaintiffs, granted the instructions asked for by the defend-

ant's counsel and adopted said instructions as its charge to the jury, and directed the jury if they found the facts stated in the charge to find a verdict for the defendant.

Whereupon the counsel for the plaintiffs, before the jury had withdrawn from the bar, did except to each and every instruction so given and charged and to the direction so given to the jury.

The jury, under the instructions of the court, then found a verdict for the defendant.

Wherefore the said plaintiffs prayed the honorable the judge of the said court to sign and seal their foregoing bill of exceptions, which is accordingly done this 17th day of April, A. D. 1885.

HUGH L. BOND. [SEAL.]

118 And on the 25th day of April, A. D. 1885, came into court the plaintiffs, Inman, Swann & Co., by their attorney, J. N. Nathans, and obtained the following order for writ of error and allowance of appeal, which order is in the words and tenor following :

Order.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In Circuit Court.

WILLIAM H. INMAN, BERNARD S. CLARK, JOHN H. INMAN, JAMES SWANN, Citizens of the State of New York, Copartners Trading under the Firm Name of Inman, Swann & Co., Plaintiffs,

against

THE SOUTH CAROLINA RAILWAY CO., a Body Corporate under the Laws of South Carolina, Defendant.

119 The plaintiffs' exceptions in this case having been signed and sealed by the judges of this court, and the plaintiffs having in open court prayed that their writ of error should be allowed that the errors of law should be corrected and set aside in the Supreme Court of the United States—

It is now ordered that the prayer of the plaintiffs be granted and the writ allowed upon the plaintiffs entering and executing bond, with good sureties, to be approved by the judges of this court, in the sum of two hundred and fifty dollars, to answer all damages and costs if the said writ shall be adjudged against said plaintiffs.

It is further ordered that the plaintiffs entering into and executing said bond the same shall be, when approved by the judges of this court, a supersedeas of the judgment in this case.

HUGH L. BOND, *C't Judge.* [SEAL.]

120 And on the 27th day of April, A. D. 1885, came into court the defendant, The South Carolina Railway Company, by its attorneys, Simonton & Barker, and filed the following judgment, which judgment is in the words and tenor following :

Judgment.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

INMAN, SWANN & Co., Plaintiffs,
against
THE SOUTH CAROLINA RAILWAY COMPANY, Defendant.

Judgment by the court or jury.

This action having been brought to a trial at a circuit court held on the seventeenth day of April, A. D. 1885, and a verdict for the defendant having been rendered therein by the jury, and the costs having been adjudged at eighty-three $\frac{20}{100}$ dollars—

121 Now, on motion of Simonton & Barker, attorneys for said defendant, it is adjudged that the South Carolina Railway Company recover of said Inman, Swann & Co. eighty-three $\frac{20}{100}$ dollars costs.

SIMONTON & BARKER,
Defendants' Attorneys.

Taxed costs signed, judgment, & execution.
April 27th, 1885.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

And on the 27th day of April, A. D. 1885, came into court the defendant, The South Carolina Railway Company, by its attorneys, Simonton & Barker, and issued the following execution, which execution is in the words and tenor following:

Execution.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

122 To T. J. Tuomey, Esq., United States marshal, or his lawful deputies, Greeting:

Whereas judgment was rendered on the seventeenth day of April, one thousand eight hundred and eighty-five, in an action in the circuit court of the United States for the district of South Carolina, between Inman, Swann, & Co., plaintiffs, and The South Carolina Railway Company, defendant, in favor of said defendant, against the said plaintiffs, for the sum of eighty-three $\frac{20}{100}$ dollars costs and charges therein, as appears to us by the judgment roll filed in the office of the clerk of the said court;

And whereas the sum of eighty-three $\frac{20}{100}$ dollars costs and charges aforesaid are now actually due thereon:

Therefore we command you that you satisfy the said judgment out of the personal property of the said judgment debtors within your district, or if sufficient personal property cannot be found then out of the real property in your district belonging to such judgment debtors on the day when the said judgment was so docketed in your district, or at any time thereafter in whose hands soever the same may be, and duly return this execution according to law to
123 the clerk of the said court at Charleston, S. C.

Witness Hon. Morrison R. Waite, Chief Justice of the United States, at Charleston, S. C., the twenty-seventh day of April, one thousand eight hundred and eighty-five.

[SEAL.] SIMONTON & BARKER,
Def'd't's Attorneys.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Statement.

Amount of judgment	
Interest	
Costs	
Attorneys	$22 50
Clerks	19 20
Marshal Tuomey	11 50
Commissioner Currey	30 20
	$83 20

(Endorsed:) No. roll 890. United States of America, dis-
124 trict of South Carolina, fourth circuit. Inman, Swann & Co., plaintiffs, against The South Carolina Railway Company, defendant. Execution against property. T. J. Tuomey, U. S. marshal for said district: Levy and collect $83.20, with interest from the — day of ——, besides your fees, &c. Simonton & Barker, attorneys for judgment creditor-.

And on the 25th day of April, A. D. 1885, came into court the plaintiffs, Inman, Swann & Co., by their attorney, J. N. Nathans, and filed the following bond in error, which bond in error is in the words and tenor following:

125 *Bond.*

Supreme Court of the United States.

WILLIAM H. INMAN, JOHN H. INMAN, JAMES SWANN, BERNARD S. Clark, and Robert W. Inman, Citizens of the State of New York and Copartners in Trade under the Firm Name of Inman, Swann & Company, Plaintiffs,

against

THE SOUTH CAROLINA RAILWAY COMPANY, a Corporation Created under the Laws of South Carolina, Defendants.

Know all men by these presents that we, S. Y. Tupper, Jr., of the city of Charleston and State of South Carolina, and Ansley D. Cohen, of the city of Charleston and State of South Carolina, and B.
126 Mantone, of the city of Charleston and State of South Carolina, are held and firmly bound unto the South Carolina Railway Company, a corporation created under the laws of South Carolina, in the sum of two hundred and fifty dollars ($250.00), to be paid to the said The South Carolina Railway Company, their successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this twenty-fifth day of April, A. D. 1885.

Whereas the above-named Inman, Swann & Co. hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of South Carolina:

Now, therefore, the condition of this obligation is such that if the above-named Inman, Swann & Co. shall prosecute their said writ of error to effect and answer all costs and damages if said In-
127 man, Swann & Co. shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

S. Y. TUPPER, JR. [L. S.]
ANSLEY D. COHEN. [L. S.]
B. MANTONE. [L. S.]

Sealed and delivered in presence of—
F. M. WATERS.

STATE OF SOUTH CAROLINA, *County of Charleston:*

Ansley D. Cohen, one of the obligors named in the within bond, being duly sworn, says that he is a resident and land-holder within this State and is worth the sum of two hundred & fifty dollars over and above all his liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

ANSLEY D. COHEN.

Sworn to before me this 25th day of April, A. D. 1885.
J. B. R. FINLEY, [L. S.]
Notary Public.

128 STATE OF SOUTH CAROLINA, *County of Charleston:*

B. Mantone, one of the obligors named in the within bond, being duly sworn, says that he is a resident and land-holder within this State, and is worth the sum of two hundred and fifty dollars over and above all his debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution. B. MANTONE.

Sworn to before — this 25th day of April, 1885.
J. B. R. FINLEY, [L. S.]
Notary Public.

STATE OF SOUTH CAROLINA, *County of Charleston:*

On the 25th day of April, 1885, before me personally came S. Y. Tupper, Jr., Ansley D. Cohen, and B. Mantone, and on the — day of ——, 1885, came —— ——, —— ——, —— ——, to me known and known to me to be the individuals described and who executed the within instrument, and severally acknowledged to me that they executed the same.

J. B. R. FINLEY, [L. S.]
Notary Public.

Approval of bond.
Apl. 25, 1885.

HUGH L. BOND.

[Endorsed:] No. roll 890. United States of America, district of South Carolina, fourth circuit. Inman, Swann & Co. *vs.* The South Carolina Railway Co. *et al.* Appeal bond. Filed 25 April, 1885. J. E. Hagood, C. C. C. U. S., dist. S. C.

129 And on the 29th day of April, A. D. 1885, came into court the plaintiffs, Inman, Swann & Co., by their attorney, J. N. Nathans, and filed the following writ of error, which writ of error is in the words and tenor following:

Writ of Error.

130 THE UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between William H. Inman, John H. Inman, James Swann, Bernard S. Clark, and Robert W. Inman, citizens of the State of New York

and copartners in trade under the firm name of Inman, Swann & Company, plaintiffs, and the South Carolina Railway Company, a corporation created under the laws of South Carolina, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and
131 proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday *on* October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this the 29th day of April, in the year of our Lord one thousand eight hundred and eighty-five (1885).

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. MAGOOD,
C. C. C. U. S., Dist. S. C.

132 I certify that on the 11th day of May, 1885, I served C. H. Simonton, one of the attorneys in this cause, personally with a copy of the within by leaving the same with him.

W. D. HANNIFIN,
Deputy U. S. Marshal.

133 [Endorsed:] Entered — docket — civil cases, folio 76. T. J. Tuomey, U. S. marshal. 6 May, '85. United States of America. No. roll 890. William H. Inman, John H. Inman, James Swann, Bernard S. Clark, and Robert W. Inman, citizens of the State of New York and copartners in trade under the firm name of Inman, Swann & Company, plaintiffs in error, against The South Carolina Railway Company, a corporation created under the laws of South Carolina, defendant in error. J. N. Nathans, att'y for plaintiffs in error. Writ of error. Original. Filed April 29, 1885. J. E. Hagood, C. C. C. U. S., dist. S. C.

134 UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the records, proceedings, and of the verdict in the case of Inman, Swann and Company, plaintiffs,

against The South Carolina Railway Company, defendant, rendered as aforesaid, together with all the proceedings had in the cause relating to the same.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston and district of South Carolina, this the 26th day of September, A. D. 1885.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Endorsed on cover: South Carolina C. C. U. S. No. 352. William H. Inman, John H. Inman, James Swann, Bernard S. Clark, and Robert W. Inman, copartners under the firm name of Inman, Swann & Company, plaintiffs in error, *vs.* The South Carolina Railway Company. Filed October 8, 1885.

Office Supreme Court U. S.
FILED
NOV 9 1898
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

WM. H. INMAN et al.,
Plaintiffs in Error,

vs.

THE SOUTH CAROLINA RAILWAY CO.,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

GEO. A. BLACK,
Of Counsel for Plaintiffs in Error.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE, N. Y.

SUPREME COURT OF THE UNITED STATES.

WILLIAM H. INMAN ET AL.
Plaintiffs in Error,

vs.

THE SOUTH CAROLINA RAILWAY COMPANY.

Brief for Plaintiffs in Error.

Preliminary Statement.

The question involved by the record of this appeal is one arising out of the conflicting interests of common carriers and insurance companies, and presents the opposite of the situation which was before this Court in the case of the Phenix Insurance Co. vs. Erie and Western Trans. Co. (117 U. S., 312).

This Court having in many decisions affirmed the doctrine that the common carrier cannot *by any form of contract* made with its shippers exempt itself from liability for its own negligence, the carrier has by ingenious devices attempted *to get round* the effect of these decisions, and the case of the Phenix Ins. Co. vs. the Erie and W. Trans. Co., above referred to, has proved that one of these devices has received the sanction of this Court.

The device presented in the present case is similar to that in the case of the Phenix Ins. Co. vs. E. & W. Trans. Co., viz., phraseology inserted in the bill of lading by which the carrier "Incurring such liability "shall have the benefit of any insurance which may "have been effected by the shipper," the difference in

the two cases being that in the present case the shipper is suing the carrier to enforce a liability for the destruction of his property, and the carrier defending on the ground that the shipper had insurance, and demanding the benefit of such insurance *before even admitting its liability*, and the shipper proving that his contracts of insurance provided that "Any act of the insured waiv- " ing or transferring or tending to defeat or decrease " any such claim against the carrier, or other person or " persons " (*i. e.*, all his or their right to claim for loss or damage) " whether before or after the insurance is " made under this policy, shall be a cancellation of the " liability of such insurance company;" and that " In " case of loss or damage under this policy the assured in " accepting payment therefor hereby, and by that act, " assigns and transfers to the said insurance company " all his or their right to claim for loss or damage as " against the carrier or other person or persons;" and further provided that, "In case of any agreement or " act, past or future, by the insured whereby any right " of recovery of the insured against any persons or " corporations is released or lost which would on ac- " ceptance of abandonment or payment of loss by this " company belong to this company, but for such agree- " ment or act, or in case this insurance is made for the " benefit of any carrier or bailee of the property in- " sured other than the person named as insured, the " company shall not be bound to pay any loss, but its " right to retain or recover the premium shall not be " affected."

Statement.

The bill of exceptions shows the following facts: The plaintiffs were copartners in business under the firm name of Inman, Swann & Co., and were the owners of five consignments of cotton shipped over the defendant line, part of which cotton, valued at $10,717.31

while in defendant's custody was destroyed by fire at Charleston, S. C., on the 29th of October, 1883.

The shipments were made under five bills of lading, the earliest of which was dated October 18, 1883 (p. 38), and each of which contained the following clauses:

> " And it is further stipulated and agreed that in " case of any loss or damage done to or sustained " by any of the cotton herein receipted for during " transportation *whereby any legal liability may be* " *incurred* by the terms of this contract, that com- " pany alone shall be held responsible therefor in " whose actual custody the cotton may be at the " time of the happening of such loss or damage, " and the company incurring such liability shall " have the benefit of any insurance which may " have been effected upon or on account of said " cotton " (p. 42).

The bills of lading did not contain any exemption of the defendant from liability for fire.

The answer admits that the defendant was a common carrier (p. 4), the receipt of the cotton and the destruction by fire of 258 bales (p. 5), and sets up as a distinct defense the clause of the bill of lading above quoted, and that the plaintiff had *fully* insured said cotton in solvent companies, which insurance was in effect at the time of the occurrence of said fire, and then puts the defense in these words:

> " That this defendant has not had the benefit of " such insurance, nor have the plaintiffs given or " offered to give it the benefit of such insurance."

It was proved on the trial that the plaintiffs held three policies of insurance, one issued by the Mechanics' and Traders' Insurance Company, dated September 7th, 1883; one by the Greenwich Insurance Company, dated September 6, 1883, and one by the Phenix Insurance Company, dated August 29, 1883. These policies are set out in full at pp. 26-39, and the bills of lading at pp. 16–24.

The policies on their face purport to cover the plain-

tiffs against the risk of fire to the amount of the loss, *less the sum of $150.* (M. & T. pol., p. 26; Greenwich pol., p. 33; Phenix pol., p. 35). The Mechanics' and Traders' policy contained this clause:

> " It is also agreed and understood that in case " of loss or damage under this policy, the as- " sured in accepting payment therefor thereby, " and by that act, assigns and transfers to said in- " surance company all his or their right to claim " for loss or damage as against the carrier or other " person or persons, to inure to their benefit, " however, to the extent only of the loss or damage " and attendant expenses of recovery paid or in- " curred by the said insurance company, and any " act of the insured waiving or transferring or " tending to defeat or decrease any such claim " against the carrier or such other person or per- " sons, whether before or after the insurance was " made under this policy, shall be a cancellation " of the liability of said insurance company for on " account of the risk insured for which loss is " claimed " (p. 29).

Also the further clause:

> " In the event of loss the assured agrees to sub- " rogate to the insurers all their claims against the " transporters of said cotton, not exceeding the " the amount paid by said insurers " (p. 26).

The Greenwich policy contained similar clauses (pp. 32, 34). The Phenix policy contained the following clauses:

> " In case of any agreement or act, past or future, " by the insured whereby any right of recovery of " the insured against any person or corporations is " released or lost which would on acceptance of " abandonment or payment of loss by this com- " pany belong to this company but for such " agreement or act, or in case this insurance " is made for the benefit of any carrier or

" bailee of the property insured other than " the person named as insured, the company shall " not be bound to pay any loss, but its right to re- " tain or recover the premium shall not be af- " fected " (p. 37).

" In event of loss the assured agrees to subro- " rate to the insurers all their claims against the " transporters of said cotton, not exceeding the " amount paid by said insurers " (p. 35).

The fire occurred on October 29, 1883 (p. 41), and on November 17, 1883, and before any proofs of loss had been presented, the several insurance companies signed a memorandum in the following words :

" In accordance with the provisions of this " policy the *estimated* loss sustained by this com- " pany of $3,667 in consequence of fire at Charles- " ton, S. C., about October 29th, '83, is hereby re- " instated, and $114.90 additional premium is " charged by this company therefor, it being un- " derstood and agreed that *when* the above loss is " finally adjusted the amount reinstated and the " premium charged shall be made correct " (pp. 26, 34, 35).

The policies in question were what were called " open policies " (p. 43) and were each in the sum of $6,666.66, the aggregate of the three being $20,000 (fols. 55, 74, 79), and each contained the provision referred to in the above quotation, in these words :

" It is also agreed that in the event of loss the " assured agree to pay the insurers additional " premium or premiums at the rate of 4 per cent. " on the amount of such loss or losses, and this " policy is thereby to be reinstated and in force to " the full amount of $20,000, unless either party " desire the cancelment of same (fols. 55, 74, 79).

On Dec. 1st, 1883, the three insurance companies issued a memorandum in these words :

" It is understood and agreed between the un-

"dersigned companies insuring Messrs. Inman, "Swann & Co., that the proofs of loss of fire at "Charleston, S. C., on Oct. 29, 1883, presented this "day, are to be considered as filed on Nov. 17th, "as all papers and vouchers to prove such loss "were forwarded by Messrs. Inman, Swann & Co., "with their consent to the S. C. Railway Company, "to collect loss from them as common carriers, "which, however, is not to prejudice Messrs. "Inman, Swann & Co.'s claim against the under- "signed insurance companies."

and on January 18, 1884, the insurance companies also signed the following memorandum:

"The undersigned companies having been noti- "fied by Messrs. Inman, Swann & Co. of loss by "fire at Charleston, S. C., on or about Oct. 29th, "1883, and proofs of loss having been presented "to the South Carolina R. R. Co. direct, on Nov. "17, 1883, with consent of said insurance com- "panies, which, however, it was agreed upon "should not prejudice the assurer's claim against "them, the claims having been agreed upon as "filed with insurance companies on said Nov. 17th, "in case the railroad should refuse to pay, and "the claim being due on Jan. 17th, 1884, Messrs. "Inman, Swann & Co. will still use every effort to "collect the claim direct, and the undersigned in- "surance companies hereby agree to pay them "(six) 6 per cent. interest from January 17th, "1884, to the time when claim is collected. This "agreement, however, is not to prejudice their "claim against the undersigned insurance com- "panies" (fol. 101).

It further appears that the bills of lading were issued to an agent of the plaintiffs, who had no authority to take bills of lading with insurance clauses (p. 47). The authority of the agent was testified to as follows:

"Q. He had authority to accept bills of lading, "didn't he? A. Yes, sir.

"Q. Your agent had authority to accept *these* "bills of lading for you, had he not? A. He had "authority to take bills of lading for the cotton, "but had to accept what the company would give "him or no bill of lading" (p. 47, fol. 107).

The suit was commenced on July 18, 1884, by the service of process on the defendant (p. 3). The plaintiffs testified that they had collected nothing from the insurance companies (p. 44, fol. 102; p. 46, fol. 104). The situation, as expressed by the witness, was: "By our policies in case of loss we have to pay 4 per cent. of that loss to keep our policy good for $20,000 all the time. My object is to get this money from the railroad company and save this 4 per cent.; and $150 average comes in there, and in case I don't get it from them to fall back on my insurers—the insurance companies—and make them pay it" (fol. 105).

It will be apparent from the foregoing statement that in any event the plaintiffs were damaged and uninsured to the extent of $150, which by the policies is to be deducted from the amount of loss in lieu of average, and that they were not entitled to be paid, even if their contracts of insurance were enforcible, *until the expiration of thirty days* after receipt of the proofs of loss.

It is also apparent that the contracts of insurance existing at the date of the loss *expressly* provided for a subrogation by the plaintiffs to the insurance companies of all their claims against the common carrier, and all of the said policies also provided that any act of the insured waiving, transferring or tending to defeat or decrease the claim of the insured against the carrier should be a cancellation of the liability of the insurance companies.

Again it is apparent that what was done after the fire between the insured and the insurance companies, if they amounted to contracts at all, were *entirely new and distinct contracts*, not in existence at the time of the fire, and so far as they created *new rights* between the parties (*if they did so*) was with the distinct under-

standing that the insured were, in the first instance, to look to the common carrier for the collection of their loss, and failing a recovery from them only were they to have recourse to the insurance companies.

Assignment of Errors.

The defendant presented five requests to charge to the Circuit Judge (p. 48), and before the Court ruled upon them asked leave to withdraw their fourth and fifth requests (p. 50, fol. 117). The only importance of these fourth and fifth requests is to show that down to the very last moment of the trial the defendant denied its *liability* to the plaintiffs for the loss.

The plaintiffs presented seven requests, all of which were denied by the Court and exceptions taken (pp. 49 and 50). The Court charged the first, second and third of the defendant's requests, to each of which the plaintiffs excepted (p. 51), and under the instructions given, the jury found a verdict for the defendant. The substance of the *defendant's* requests as charged and which present some of the questions of law to be considered by this Court is:

1st. That the plaintiffs are bound by the stipulation contained in the bill of lading that the carrier should have the benefit of any insurance.

2d. That the plaintiffs before they can recover must show by proof that they had given to the defendant the benefit of the insurance or tendered the same, and that it had been refused.

3d. That if the jury found that an agreement was made between the plaintiffs and their insurers, by which the insurer waived proof of loss and admitted the claim of plaintiff to be due by them on the 17th of January, 1884, and the plaintiffs agreed to give time upon said claim to the insurers, and meantime to press the claim for the cotton against the South Carolina Railway Company, defendant, in consideration of payment to

plaintiffs by their insurers of 6 per cent. interest per annum on said admitted claim from 17th of January, 1884, then plaintiff cannot recover and verdict must be for defendant.

The substance of the plaintiff's requests to charge which present the other questions of law to be considered by this Court, is as follows:

1st. That the stipulations in the bill of lading giving the defendant the benefit of insurance effected by the plaintiffs, is unreasonable, contrary to public policy and the duties and obligations imposed by law upon carriers, and therefore void.

2d. That if the above recited stipulation in the bills of lading is valid, then such stipulation only entitles the defendant to such insurance upon payment by it of plaintiffs' loss, unless the plaintiffs have already been paid by the insurer.

3d. That if the stipulation above recited is valid, then it only entitles the defendant to such insurance as is in the hands of the plaintiffs, and if the policy is void or unproductive, this is no defense.

4th. That if the stipulation above recited is valid, then no legal obligation arose therefrom that the plaintiffs should effect valid insurance, and if such insurance is invalid it is no defense.

5th. That as under the stipulation above recited the plaintiffs may or may not have insured as they pleased, the defendant takes such insurance, if effected, subject to all infirmities, and the same constitutes no defense.

6th. That the carrier is primarily liable for loss or damage, and in order to entitle it to the benefit of plaintiffs' insurance it must *first* pay the loss sustained.

7th. That under the bills of lading in question the defendant is not exempt from loss by fire, as such exemption only applies to carriers by water.

POINTS.

First. The case at bar is distinguished from the case of the Phenix Ins. Co. vs. Erie and Western Trans. Co. (117 U. S., 312) in the following particulars :

1st. In the present case there is an EXPRESS stipulation that the insurer is to have the rights of the insured against the carrier :—the words are :

> " In the event of loss the assured agrees to sub-
> " rogate to the insurers all their claims against the
> " transporters of said cotton not exceeding the
> " amount paid by said insurers " (p. 47, fols. 109, 110), and this agreement was made Sept. 7, 1883, while the earliest of the bills of lading was Oct. 18th, 1883.

In the Phenix case the Court in two places lays stress upon the provisions above named in these words (p. 320) :

> " The policy of insurance contains no *express*
> " stipulation for the assignment to the insurer of
> " the assured's right of action against third per-
> " sons."

(p, 326) : " Nor does this conclusion impair any
" lawful rights of the insurer. His rights of sub-
" rogation arising out of the contract of insurance
" and payment of the loss,is only to such rights as
" the assured has, by law or contract, against third
" persons. *The policy containing no express stipu-*
" *lation upon the subject*, and there being no evi-
" dence of any fraudulent concealment or misrepre-
" sentation by the owner in obtaining the insur-
" ance, the existence of the stipulation between the
" owner and the carrier would have afforded no
" defense to an action on the policy."

2d. In the Phenix case there was no clause in the policy which was in any respect the equivalent of what is contained in those now before the Court, to the effect

> " that any act of the insured *waiving* or trans-

> " ferring, or tending to defeat or decrease any
> " such claim against the carrier, whether before or
> " after the insurance was made under this policy,
> " shall be a cancellation of the liability of such
> " insurance company " ;

nor of the words contained in the Phenix policy, as follows :

> " Or in case this insurance is made for the bene-
> " fit of any carrier or bailee of the property insured
> " other than the person named as insured, the
> "company shall not be bound to pay any loss "
> (p. 47, fol. 109).

From the foregoing extracts, it is apparent that the rights arising out of the contracts of insurance in this case, cannot be determined by the decision made in the Phenix case, and that the terms of the policies now before the Court and made prior to the shipment which require that the assured shall vest in his insurers all his claims against the carrier, are in conflict with the words of the bills of lading, which require that the carrier shall have all the rights of the insured against the companies.

The situation presented is one of subrogation in *both directions.*

Second. It was determined in the Phenix case that the language of the bill of lading " does not compel the owner of the goods to stand his own insurer, or to obtain insurance on the goods " (p. 323), and this decision of the Court shows the error of the Circuit Court in refusing to charge the 3d, 4th and 5th of plaintiffs' requests (p. 49, fol. 113).

Third. The extent to which this Court has gone in determining the validity of the clause of the bill of lading in question is expressed in the Phenix case in these words :

> " This stipulation does not, *in terms or in effect,*
> " prevent the owner from being reimbursed *the full*

" *value of the goods ;* but being valid as between " the owner and the carrier, it does prevent either " the owner himself, or the insurer, who can only " sue in his right, from maintaining an action " against the carrier upon any terms *inconsistent* " with this stipulation " (p. 325).

What was meant by the Court in the above extract is the question which is to be determined in the present case.

A. The plaintiffs, the owners of the goods, bring their action against the carrier for the *full value* of the goods destroyed by a cause for which the carrier, under its common law liability, is clearly responsible.

B. The carrier denies such liability, and without alleging any act of the plaintiffs which was in violation of the terms of their contract, or *any request* to have the plaintiffs transfer to the defendant the policies of insurance, or *any offer* to pay, or even admitting its liability to pay upon such transfer being made, it has, *in an action at law*, set up the defense that the plaintiff was fully insured, and that the defendant has not had the benefit of such insurance, nor have the plaintiffs given or offered to give it the benefit of such insurance (p. 5 ; fol. 11), and upon proof which plainly showed that the plaintiffs were *not* fully insured, and which did not disclose any refusal on their part, or any request on the part of the defendant, or any act which even in a court of equity would amount to a defense, the plaintiffs have been turned out of Court upon the theory entertained by the Circuit Judge, and expressed, in the language of defendant's attorney in his 2d request, that the plaintiffs, before they can recover against defendant, must show that they have performed their part of this contract by proving that they have given to the S. C. Ry. Co. the benefit of the insurance, or that they have been ready to perform their contract by *tendering* such benefit, and that the same had been refused (p. 48 ; fol. 111)

C. The language in the Phenix case above quoted (p. 325) to the effect that the plaintiff (the shipper and

owner of the goods) may not maintain an action against the carrier upon terms *inconsistent* with this stipulation, requires the Court, in order to sustain the judgment below, to determine that the present action, upon the facts shown upon the trial, was brought upon terms *inconsistent* with this stipulation.

The Phenix case decided that the subrogation of the *carrier* to the rights of the owner against his insurer prevented that insurer (who had *no express agreement* from the same owner subrogating the insurer to the owner's rights against the carrier) from pursuing the carrier, and this result followed as a consequence of the Court's conclusion that while the owner was not compelled to insure yet if he did insure and *made no express agreement to subrogate his insurers, he thereby retained the right to make an express agreement to subrogate his carrier.*

In the case at bar the *owner*, after having *first expressly* agreed with his underwriters to subrogate them (and also agreed that the policy shall be void if the insurance is made for the benefit of the carrier), has then expressly agreed with his carrier that it shall have the benefit of such insurance. This position was discussed in Home Ins. Co. vs. W. Trans. Co., 4 Robt., 267:

ROBERTSON, C. J., p. 269, said: "It has been frequently "held in the Courts of this State as well as those of "Mass., that were an owner insured and damaged by "perils insured against abandons all "*spes recuperandi*" "to the underwriter, the latter on paying the loss is en- "titled to be subrogated to all the rights of the insured "to recover against third parties who caused the dam- "age by neglect or otherwise.

At. Ins. Co. vs. Storrow, 1 Edw., 621.
S. C., 5 Paige, 285.
N. Y. Ins. Co. vs. Roulet, 24 Wend., 513.
Rogers vs. Hosack's Ex., 18 Wend., 319.
Etna F. Ins. Co. vs. Tyler, 16 Wend., 385.
Hart vs. West R. R., 13 Metc., 99.

"And the entire destruction of the subject of insur- "ances (Mayor N. Y. vs. Pentz, 24 Wend., 668, opinion "Verplanck, Senator, 671), or the payment of the loss "N. Y. Ins. Co. vs. Roulet, 24 Wend., 317, per Ed-

" wards, Senator), has been considered *equipollent* with " an abandonment in giving the insurer such right of " subrogation.

" In the case of a Common Carrier it is true the " owner of the goods transported by him may by agree- " ment give him the benefit of an insurance on them " effected by such owner. So as at least to deprive the " underwriter of any remedy against such carrier al- " though such insurance was made without knowledge " by the underwriter of the agreement with such carrier " (Merc. Mu. Ins. Co. vs. Cabbs, 20 N. Y., 173).

" *In fact such carrier is an insurer as well as the un-* " *derwriter, and their rights seem to depend entirely on* " *the action of the owner, who may by previous agree-* " *ment give either the preference in having a claim* " *against the other in case of loss.*

NOTE : In the case at bar the insurance contracts are the earlier in date and do expressly give such preference to the insured.

The owner's contract with the carrier does not make it *obligatory* to insure fully or at all; does not bind him if he does insure, to do so in such a form as to cover the carrier's risks, nor does it in any way impair his right to make any legal contract he may choose with his insurer, and does not limit his right to pursue his remedies against the carrier *until after* exhausting those against the insurer.

The owner has made two *contracts* to subrogate.

The effect of the latter contract (with the carriers) is to destroy the former (with the insurer), and the question is whether it has also destroyed the owner's right to hold the carrier for his loss.

The owner has not agreed in any form to release the carrier from its full common law liability for fire, and the question is has the owner lost his right to hold the carrier by *agreeing* to give the carrier the benefit of his insurance, the insurance being in the form proved in this case.

In the language of this Court in the Phenix case is " *the assured's right of action limited or restricted by*

" *lawful contact between him and the person sought to be* " *made responsible for the loss?*" For if it is the Court says, "A suit by the insurer in the right of the insured is " subject to like limitations or restrictions," and in the Phenix case the policy containing no *express agreement to subrogate*, and the Insurance Company not having been deceived or fraudulently imposed upon and having voluntarily paid a loss, could not make the carrier who had by *an express contract*, all the owner's rights against the Insurance Company, pay for the loss insured to that owner.

Fourth. Although a contract which exempts the carrier from liability for his *own* negligence is unlawful, yet in the Phenix case it was held that the *effect* of the clause giving the benefit of the insurance to the carrier was to prevent the insurance company from recovering for the loss caused by the negligence of the carrier, on the theory that the carrier might *lawfully* insure himself against liability *for his own negligence* in his occupation as carrier, and, therefore, might lawfully contract with the owner of the goods that he should have the benefit of the insurance, such owner had obtained upon his goods. **The result of which reasoning is that the only person in the whole world with whom the carrier may not make a contract of insurance or indemnity against the consequences of his own negligence, is the owner of the goods he is transporting,** and although the reason given for the rule prohibiting such contracts is that the carrier shall be held on the ground of public policy to the highest degree of diligence against his own negligence, yet he may, by insurance, relieve himself from all ultimate responsibility for such negligence.

Another view of the same situation is this; while accepting, as settled law, that the carrier may not contract with the owner of the goods for an exemption from liability for his own negligence as being contrary to that principle of law, called public policy, the insurer,

it is said, cannot prevent the owner of the goods from making any *lawful* contract with the carrier, and yet, the *effect* of the decision in the Phenix case is to give the carrier, when insurance exists indirectly and contingently, the same benefit in respect to his liability for his own negligence *as if he had contracted with the owner* that he should not be liable; and while it is true that the Courts have laid it down that the owner's right to *lawfully* contract with the carrier is unlimited, yet they have never before gone to the extent of saying that the insurer should be in any worse position than the owner of the goods, whose surety he is, which is repugnant to the very nature of the contract of insurance. It is manifest that while giving to the owner full liberty to contract with the carrier to the extent of everything which the law permits, in exoneration of the carrier's liability, *yet the insurer in making his contract with the owner has a right to assume that no contract that the owner may make with the carrier shall, either directly or indirectly, have the effect of relieving the carrier from liability for his own negligence*, for any other result would work a fraud on the rights of the insurer. And if the right of the insurers to be subrogated to the owner's claim against the carrier for its negligence was part of the original contract of insurance, then any agreement by which the carrier was discharged from such liability would be a bartering away of the rights of the insurance company.

See dissenting opinion of BRADLEY, J., in Phenix Case, 118 U.S., p. 210.

Fifth. In substance and effect the defense in this case is that *before payment of the loss* to the owners of the goods (the LIABILITY for which loss the carrier has got to admit before he can become entitled to any insurance), the carrier can demand from the owner his policies of insurance, and that the allegation that the owner has such policies and has not *offered* them to the carrier is equivalent to a plea of payment. This is going very far—much farther than any case justified.

The most that has been said on the subject is found in the case of Rintoul vs. N. Y. C. R. R. Co. (17 Fed. Rep., 905), where Judge SHIPMAN says (909):

> "By the contract in question, the owner agrees "that as between him and the carrier, the latter, "*when he has paid for the loss*, may have the bene- "fit of the insurance."

Sixth. The case last quoted contains also this language (p. 908):

> "(3) The contract is not *necessarily* unfair to "the insurers. At common law, the owner who "has been paid in full or in part for his loss by "the insurance company may sue the carrier upon "the contract of bailment, and as to so much of "the amount recovered from the carrier as is in "excess of a full satisfaction of the loss, the "owner will be a trustee for the insurance com- "pany. *It seems* that the effect of the clause in "the bill of lading now under consideration is to "provide that the owner in such circumstances is "*not a trustee for the insurance company, but a* "*trustee for the carrier.* If such a contract is en- "tered into *without fraudulent concealment* of the "facts from the insurers (of which there is no evi- "dence in this case), it cannot properly be con- "sidered unjust or unreasonable, because the in- "surance company obtains its remedy, not by vir- "tue of a contract of its own with the carrier, but "through the owners' contract, and its right de- "pends upon or is subject to the agreement "made by the owner with the carrier, which *he is* "*at liberty to make to suit his own interest*, pro- "vided there is *no fraudulent concealment from* "*the insurers.* They can, in view of this pro- "vision in the bill of lading, modify the contract "which they have heretofore customarily made "with the insured, and the result will probably be "that the insurers will also make provisions in

" their policies, by virtue of which insurance on
" property in transit will have a limited char-
" acter."

Such limitations will be found in the policies issued in the present case to the plaintiffs and the legal effect of these limitations must be considered when the attempt is made to enforce them by the carrier after he has paid the loss to the owners of the property destroyed.

The right of the insurance company, not liable under its contract of insurance, to make a new agreement to pay its customers if they did not succeed in their claim against the carrier, cannot be questioned, and the consideration for such an agreement would be the effort on the part of the insured to make a recovery. But this would be an entirely new contract, and one with which the carrier would have no interest; it could not properly be called insurance. The policies in question created and limited the liability of the insurance company, and by the terms of those contracts they were not liable to the plaintiffs by reason of the clause of the bills of lading, making the insurance for the benefit of the carrier.

Carstaws vs. M. & T. Ins. Co., 18 F. R., 473.

The view above stated is illustated by the case of the Excelsior Fire Ins. Co., vs. R. Ins. Co. (55 N. Y., 343), where the situation of an insurance company which denies its liability, and yet desires for purposes of business policy to pay, is considered in these words (p. 352):

" Even if an insurance company may not pur-
" chase or take an assignment of and prosecute a
" policy of insurance upon property (NOTE. *This*
" *is an obvious misprint; it should be a* ' MORT-
" ' GAGE UPON PROPERTY,') where it has no in-
" terest and no claim is made against it, there is
" no reason why it or a Receiver of its effects,
" may not in such a case as this, where a claim is
" presented against it, and it is not, while unadju-

> " dicated, entirely clear that liability does not
> " exist, make such arrangement as has been made,
> " with one who actually holds a policy issued
> " by it."

In the Mercantile Mut. Ins. Co. vs. Calebs (20 N. Y., 173), the Court said (p. 177), ALLEN, J. :

> " If there was any fraudulent concealment of
> " facts on the part of the latter (the insured) at
> " the time they obtained their insurance, it would
> " have avoided the policies, and they would not
> " have been bound to pay the loss. If they paid it
> " VOLUNTARILY, they are not entitled to be subro-
> " gated."

And this statement is applicable to the facts in this case, since the Insurance Company have not paid the loss and have protected themselves against paying it until the Railway Company has been sued by the owners.

The same principle was upheld by the Court of Appeals in Foster vs. Van Reed (70 N. Y., 19). In that case the policy was on the interest of Mrs. Plank as mortgagee, and the action was by the assignee of the Insurance Company to foreclose the mortgage assigned. The policy contained a clause in these words (p. 24) :

> " In case of loss the assured shall assign to this
> " company an interest in said mortgage equal to
> " the amount of loss paid."

A fire occurred and the insurance company paid the loss with knowledge of the fire, to Mrs. Plank, and took from her an assignment of the mortgage. The mortgage contained the usual clause for insurance by the mortgagor, and an agreement that in default thereof the mortgagee, or his representative, might make such insurance, and the premiums paid should be deemed secured by the mortgage. The trial Court found that the insurance was effected by Mrs. Plank under the insurance clause in the mortgage, and as a conclusion of law that the insurance *inured to the benefit of the mort-*

gagor. The Court of Appeals said (p. 26), MILLER, J.:

> " It is difficult to see how the insurer can be de-
> " prived of the right of subrogation when it is
> " made a part of the contract that it shall enjoy
> " such right. And whether the company knew of
> " the agreement in the mortgage at the time of
> " issuing the policy, or assented to it or otherwise,
> " makes no difference, for, in either case, the con-
> " tract between Mrs. Plank and the company is
> " unaffected by it (Kernochan vs. N. Y. Bowery
> " Ins. Co., 17 N. Y., 428). The views expressed
> " are met by various objections, and it is, among
> " other things, claimed that the debt was extin-
> " guished by the payment by the plaintiff to the
> " mortgagee of the amount of the insurance to that
> " extent. The authorities cited to sustain this
> " position are cases **where there was no**
> " **agreement as to subrogation,** *and do*
> " *not establish such a proposition in cases in which*
> " *there was a clause in the policy authorizing an as-*
> " *signment in case of loss.*"

The above is almost identical with the case at bar. These insurance companies had effected their policy containing the clause giving them a claim against a carrier *long prior* to the contract with the carrier under his bill of lading, and the case cited is, in one aspect, stronger against the claim of the insurance company, which the Court then sustained, for the mortgage contained an express and *valid* provision authorizing an insurance by the mortgagee at the expense of the mortgagor, whereas, the bill of lading contains no clause *authorizing* or *requiring* any insurance, and no agreement by the carrier to pay for it. As was said by this Court in the Phenix case (117 U. S., 312):

> " But the stipulation upon the subject of insur-
> " ance in the bill of lading before us is governed
> " by other considerations. *It does not compel the*
> " *owner of the goods to stand his own insurer or to*
> " *obtain insurance on the goods.*"

Seventh. Some other views of the effect of the clause giving the carrier the benefit of the insurance will throw light upon the extent and operation of the clause, and to illustrate, we may suppose cases.

(1) If after a shipment was made under these bills of lading, the owner sold the property to a third party who was uninsured, the contract of insurance, being a personal contract with the owner of the goods at the time of effecting the insurance would not pass with the property, and if the carrier subsequent to such sale caused injury to the goods such transfer would be no defense to the action by the then owners.

(2) If the goods were covered by a *marine* policy of insurance, and were, in the course of the voyage, damaged to an amount exceeding fifty per cent. of their value, the owner of the goods would have an absolute right to abandon the goods in their damaged condition to the insurer, who would *thereby* become the owner of what was left, and as such owner would have a right to the completion of the contract by the carrier, and being such OWNER a *further* injury by the carrier would not be protected by any insurance.

Eighth. If the foregoing argument fails to convince the Court that the case of Phenix Ins. Co. vs. The E. & W. Trans. Co. does not *apply* and cannot therefore govern this case, it then becomes necessary to examine the grounds on which that decision rest and to see if it was rightly made. One member of the Court dissented (see 118 U. S., p. 210).

(I.) The foundation on which the Court has built up the result it reached in the above case is that a common carrier *may lawfully protect himself against the consequences of his own negligence* by an insurance contract, and the doctrine is expressed in these words (p. 324) :

" No rule of law or of public policy is violated

> " by allowing *a common carrier*, like any other per-
> " son having either the general property or a pecu-
> " liar interest in goods to have them insured
> " against the usual perils, and to recover for any
> " loss from such perils, though occasioned by the
> " negligence *of his own servants*."

It is respectfully insisted that this statement is too broad, and for the following reasons :

(A) **A common carrier's is the only occupation to which the Courts have applied for a wise reason the principle of public policy under discussion.**

(B) Although in language it is limited to insurance against loss occasioned by negligence of *his servants*, yet as a proposition it is extended to the carrier's *own* negligence, for *the reason given* applies with equal force to both positions. It is : 324

> " He does not diminish his own responsibility to
> " the owner of the goods, but rather increases his
> " means of meeting that responsibility by insur-
> " ance against his *own* as well as *his servants'* negli-
> " gence."

(C) The foundation of the rule of public policy, that the carrier shall not exempt himself by a contract *with the owner* of the goods from liability for his own negligence, is that *such a contract* tends to relax that diligence in the performance of his duties as a public carrier which the law exacts. This is shown by the language of this Court in Bank of Kentucky vs. Adams Ex. Co. (93 U. S., 174), STRONG, J. (183).

> " The FOUNDATION of the rule is that it tends to
> " the greater security of consignors, who always
> " deal with such carriers at a disadvantage *It*
> " *tends to induce greater care and watchfulness in*
> " *those to whom an owner intrusts his goods, and by*
> " *whom alone the needful care can be exercised.*
> " ANY CONTRACT *that withdraws a motive for such*
> " *care, or that make a failure to bestow upon the duty*

> " *assumed extreme vigilance and caution more*
> " *probable*, takes away the security of the con-
> " signors, and makes common carriage more un-
> " reliable."

Railroad Co. vs. Lockwood (17 Wall., 357), BRADLEY, J. (359).

> " The question is, therefore * * * whether
> " a modification which gives license and immunity
> " to negligence and carelessness on the part of a
> " public carrier or his servants, is not so evidently
> " repugnant to that policy as to be altogether null
> " and void, or at least null and void under certain
> " circumstances. * * * In regulating the pub-
> " lic establishment of *common* carriers, the great
> " object of the law was to secure the utmost eare
> " and diligence in their important duties."

The above extracts demonstrate that in the minds of the Judges cited, at least, it was regarded *as more important to prevent injury* to property by exacting a high degree of care and diligence, flowing from the knowledge of a great responsibility, *than to increase the ability* of the carrier to pay for the loss by permitting him to insure against injury caused by his own or his servants' negligence, and so the reason given for the incitement to such care being an important public consideration, should outweigh any possible advantage arising from a third party being made responsible for the want of such care.

II. It is said by the learned Court in the Phenix case, that some trace of the distinction supposed to exist between the ship-*owner's* right to collect insurance obtained by general description of his *ship* and the *goods* carried by her could have been found in the books, if such a distinction existed, and several cases are cited, but in reading these cases it must be borne in mind that the right of a **common** carrier to insure against his own negligence must not be confounded with the right of a *warehouseman*, a *wharfinger* or a *special* carrier to effect such insurance, and that it is only

to the *common carrier* who is exercising *public functions* that for reasons of public policy the law has attached the restrictions under discussion, and that no analogy can be drawn from other relations as to which no such restriction has ever existed.

And a further consideration must be steadily kept in view, viz., that **in those States and countries where the public policy which is the foundation of the restriction does not exist, the restriction itself does not exist;** and that whatever determinations have been made by those States and countries CAN BE NO AUTHORITY for a court which has determined the question of public policy against any relaxation of the liability of the common carrier for his negligent acts.

In view of the last proposition a historical review of the state of the law in England and the States of New York and Massachusetts in which the decisions cited from were made, is necessary.

FIRST, England. In the case of Perkins vs. N. Y. C. R. R. Co. (24 N. Y., 196), Judge SELDEN said (p. 215):

> "It has long been settled in England that com-
> " mon carriers may, by special contract, regulate
> " and control the extent of their responsibility
> " (Story on Bailment, Sec. 549; Angell on Carriers,
> " Sec. 220, *et seq.*). *There can be no doubt that this*
> " *right in England is held to extend to every degree of*
> " *negligence, however gross, and, as I apprehend, even*
> " *to the fraudulent or willful misconduct of the servant*
> " *or agent of the carrier* (Leeson vs. Holt, 1 Stark.,
> " 186). In this case, which was an action against
> " common carriers for negligence, in which the de-
> " fense set up was that there was a special con-
> " tract exempting the carrier from liability, Lord
> " ELLENBOROUGH said, 'Under the terms of the pres-
> " ent notice, if a servant of the carriers had in the
> " most willful and wanton manner destroyed the
> " furniture entrusted to them, the principals would
> " not have been liable.' That this is the rule in
> " England there is no doubt. There are now vari-
> " ous statutes on the subject in that country, com-

" mencing with that of 1 George IV., but none which
" impair the force of this rule of the *common law.*"

SECOND. New York. In 1838 the cases of Hollister vs. Nowlin (19 Wend., 234), and Cole vs. Goodwin (19 Wend., 251), were decided by the Supreme Court, and a discussion of all the prior English cases led to the conclusion that **a notice would not operate to discharge or limit the liability of the carrier,** the English cases being regarded as post-revolutionary; and the decision in the latter case being put upon the grounds of public policy, which was expressed in these words by Judge COWEN (p. 281):

" There are no principles of law better settled
" than that whatever has an obvious tendency to
" encourage guilty negligence, fraud or crime, is
" contrary to public policy. Such in the very
" nature of things is the consequence of allowing
" the common carrier to throw off or in any way
" restrict his legal liability."

The case before the Court being one of the *effect of notice* and not of express contract, this dicta has only the weight of the high name of Judge COWEN, and it did not receive the support of the later decisions of that State, for in Dorr vs. N. J. Steam Nav. Co. (1 Kernan, 485), that Court laid down the law in these words (492):

" That a carrier may, by express contract, re-
" strict his common law liability is now, I think, a
" well established rule of law. It is so understood
" in England (Alleyn, 93; 1 Vent., 190, 238;
" Peakes N. P. C., 150; 4 Burr., 2301; 1 Starkie's
" R., 186; 2 Taunt., 271; 8 Mess. & Welsby, 443;
" 4 Co., 84)."

THIRD. Massachusetts.

There is no doubt that in this State it is the law that a carrier may not contract to exempt himself from liability for his own negligence, and this Court cites in the Phenix case:

Sch. "Dist" vs. Boston, &c., R. R. Co., 102 Mass., 556.

GRAY, J.: "But the special contract here set up (in the answer) is not alleged and could not by law be permitted to exempt the defendants from liability for injuries by their own negligence (citing Squire vs. N. Y. Cent. R. R. Co., 98 Mass., 239).

III. The above being the state of the law in England, New York and Massachusetts, an examination of what those Courts have decided in respect to the right of the carrier to insure against his own negligence will show that no decision that can be deemed controlling or even entitled to weight as an argument (in view of the decisions made in England and in New York that a carrier may exempt himself by contract from liability for negligence), has been made.

Certainly the authorities that a warehouseman, a factor or a wharfinger can so insure are not such.

The cases cited in Phenix Ins. Co. vs. E. & W. Trans. Co., p. 324, are as follows:

The English Cases.

(1) Crowley vs. Cowen (3 B. & Ad., 478).

This case was decided in 1832. The insurance was on goods on a canal boat which was *accidentylly* sunk in the canal (479). The plaintiff was a common carrier, and the insurance was as interest might thereafter appear warranted free from damage or loss that may arise from wet occasioned by rain, snow or hail or from any loss arising from plunderage, barratry or pilferage.

The objections to policy were (480): 1. That this policy which pursued ordinary form did not cover the interest of the plaintiffs since it purported to protect goods against the usual risks to which the owners of goods are liable, whereas the loss alleged was one *arising out of the plaintiff's liability as carriers to risks to which carriers are liable.* (Note.—Nothing said about negligence).

TENTERDEN, C. J., 486. Although the *subject matter* of the insurance must be properly described the *nature* of

the interest may in general be left at large. Here the subject matter is very sufficiently described and the policy shows that the sum to be received in case of loss was for further consideration "as interest might appear thereafter." The instrument is not artificially framed—it would have been better if it had expressly shown that the object was to indemnify the plaintiff *as carrier*. Still, I think it is sufficient.

PARKE, J., 487 : It *was admitted here that the plaintiffs had some interest which they might insure.* It was that in fact which carriers ordinarily have. The ONLY QUESTION is whether the interest, such as it was, was sufficiently described in the policy.

Clearly this insurance if, from the meagre statement of facts in the report, it should be assumed that it did cover the negligence of the carrier, comes within the distinction above noted, to wit: that by the law of England a contract of the carrier with the owner of the goods to limit his liability for the negligence of his servants being valid, an agreement to insure agains such negligence would be equally valid.

(2) Walker vs. Maitland, 5 Barn. & Ald., 171 (1821).

Plaintiff was the owner of the ship "Britannia" and **chartered her** to James Wildman to proceed to the West Indies and there load and bring home a cargo of colonial produce. By a local usage the risk of bringing the produce from the shore to the ship **as between the charterer and the ship owner** is borne by the ship owner. The policy inssued to the ship owner covered this risk. A loss happened by which a boat was beaten to pieces caused by negligence of the crew.

ABBOTT, C. J. : "The subject of this insurance was "very special—it was on boats belonging to the ship "'Britannia,' and on produce in said boats, or in any "other craft employed in loading the ship during her "stay at St. Kitts. No doubt the owner under this "policy expected to be indemnified against the loss in "question.

"The words of the policy are very large, and al- "though it may appear extraordinary that the under-

" writers should undertake to indemnify the assured " against the negligence of the master and crew, which " is a species of misconduct on their part, yet it is " clear that they do so in the case of baratry, which is " the highest species of misconduct of which the mas- " ter and crew can be guilty. In this case the imme- " diate cause of the loss was the violence of the winds " and waves.

" No decision can be cited where in such a case the " underwriters have been held excused in consequence " of the loss having been remotely occasioned by the " negligence of the crew."

" I am afraid of laying down any such rule. It will " introduce an infinite number of questions as to the " *quantum* of care, &c."

The ship owner was in no sense a common carrier—he had merely let the carrying capacity of his ship to another.

And it was permitted, *even to* **common** *carriers*, by English law to contract to exempt themselves from liability for their servants' negligence.

(3) Waters vs. Monarch Assr. Co. (5 El. and Bl., 870):

" The policy in this case was a *fire* policy, and in it plaintiff was described as a corn and flour factor **warehouseman and wharfinger,** and the policy was expressed to cover £3,000 on stock in trade and utensils in their warehouse, situate in Holland street; £400 on goods in trust or on commission therein, £100 on fixtures or fittings in the same, £100 on the steam engine boiler and machinery in the engine-house forming part of the said warehouse; £500 on live and dead stock and utensils in stabling adjoining the above mentioned warehouse, not exceeding £40 on any one horse (p. 871).

The question was as to plaintiff's right to recover as bailees under the words " goods in trust " (p. 880), and the Court held that " the policy was intended to protect the goods entrusted to them," and Lord CAMPBELL says (p. 880): " It would be very " inconvenient if **wharfingers** could not protect " such goods by a floating policy; then this being the

" meaning of the policy, is there anything illegal in " it? It cannot now be disputed that it would be " legal at common law, and Mr. Lush properly admits " that it is not prohibited by the terms of any statute. " And I think that a person entrusted with goods can " insure them without orders from the owner, and " even without informing him that there was such a " policy. It would be most inconvenient in business " if a wharfinger could not at his own cost keep up a " floating policy for the benefit of all who might be- " come his customers."

No question of common carrier arose in the case.

(4) London & N. W. Ry. Co. vs. Glynn (1 El. & El., 652; 1859). Policy dated Dec. 11, 1854, by which £15,000 was insured on goods plaintiffs own and **in trust as carriers** in a certain warehouse in the policy named and destroyed by fire in said warehouse.

The parcel of silk selected to test the right to recover was received by Pickford & Co., plaintiffs' agents, to be carried from London to Edinburgh, and was deposited by P. & Co. in the warehouse preparatory to its being despatched to its destination, and was burned.

P. & Co., for plaintiffs, after the fire paid the owner part of the value in discharge of his claim against plaintiff.

Questions for the *opinion* of the Court were whether having regard to the provisions of the Carriers' Act, 11 Geo. IV., and 1 W. IV., Ch. 68, plaintiffs were entitled to recover the *value* of the silk *or the amount paid* the owner. Act of Geo. IV. relieves carrier, as *value* of package was not declared to carrier.

WIGHTMAN, J. (p. 661): " *It is not contended that there* " *is anything illegal in this policy.* * * * It is true " that this insurance is in the nature of a voluntary " trust, undertaken by the plaintiffs without the knowl- " edge of the *cestui que trust*, the owners of the goods, " but it is a trust clearly binding on the plaintiffs in " equity. * * * The circumstance that the plaintiffs, " in consequence of the non-compliance with the Car- " riers' Act, are not liable *as carriers*, is not, it seems " to me, very material to the present question. In

" Waters vs. The Monarch Ins. Co., 5 E. & B., 870, the " plaintiffs, being *warehousemen*, and *therefore* not in- " surers, were not liable to the owners of the goods " which were burnt; but the Court held that that fact " did not prevent the Insurance Company from being " liable to the plaintiffs to the amount of the full value " of the goods, although the utmost interest the plain- " tiffs themselves had in the goods was to the extent of " their warehouse charges for which they had a lien " upon them. That case is in principle undistinguish- " able from the present and is conclusive in favor of the " plaintiffs."

COMPTON, J. (p. 664): " The fact that the plaintiffs, " in consequence of non-compliance with the provisions " as to notice of the Carriers' Act, were not liable to " the owners for the loss of the goods, does not in my " judgment at all affect the case. The owner may fairly " have chosen, knowing that an insurance had been ef- " fected by the plaintiffs to look to the insurance office " for compensation instead of to the plaintiffs. I do not " see that there is any obligation under that act upon " the owners of goods above the value of £10 to de- " clare their value to the carrier: if they are willing to " run the risk of the loss of the goods without having " any redress against the carrier, they may do so. But " there is no hardship in holding the insurance office " liable to the full value of the goods, for they have re- " ceived the premium upon the full value."

(5) North Br. Ins. Co. vs. L., L. & Globe Ins. Co., 5 Ch. D., 569.

The policy in this case was effected by B. & Co. **wharfingers** and covered grain and seed—the assured's own or in trust or held on commission for which they were responsible. No question of negligence was in the case.

(6) Joyce vs. Kennard, L. R., 7 Q. B., 78.:

Plaintiffs were lightermen, and policy covered all losses to goods carried by J. & Son, lightermen, for which losses J. & Son may be liable to the owners. The policy was for £2,000, of which defendant underwrote £100. A loss happened for which plaintiffs became

liable to the owners to the amount of £1,100. The total value at risk was £20,000.

It was held that the sum to be recovered was not merely the proportion which the sum insured bore to the amount at risk—but the plaintiff could recover of defendant £55 as his proportion. The Court held (82) it was a mere question of construction of the policy—

And no other question was considered. It is a good authority for the proposition that IN ENGLAND, a contract of insurance by a common carrier is valid—but it goes no further. No question of whether it covered the negligence of the carrier or not was presented; and it is one of that class of cases that decides nothing but the one case before the Court.

New York Cases.

Again I repeat that no cases from this State where the carrier can contract to exempt himself from liability for his negligence can be authority, or even argument in the Courts of the United States, on the point in question. The cases cited are:

(1) De Fores vs. Fulton F. Ins. Co. (1 Hall, 84, 110).

This was the case of an insurance by a *commission merchant* whose policy covered goods "as well the "property of the assured, as held by them in trust or "on commission,"

and a statement is made (p. 110) in these words:

> "A carrier may insure the goods he contracts to "convey; yet he has neither the legal title, nor "the beneficial interest in them, but he is respon- "sible for their loss. His insurance is upon the "goods; yet his indemnity is against the conse- "quences of his implied guaranty for their safe "carriage, and not against the loss or deteriora- "tion of the property by the perils insured "against."

This, of course, was a mere dictum, and it must be limited to that class of risks which the carrier is per-

mitted, by the policy of law, to absolve himself from personal liability for, and it is by no means an authority that a *common* carrier may insure against the consequences of his own negligence, nor was that subject considered by the Court.

(2) Savage vs. Corn Exch. Ins. Co. (36 N. Y., 655):

This is an authority in favor of the position taken by the plaintiff in this case, and reference to the report of the case (4 Bos., 3) shows that the insurance was as follows:

> "The perils, risks, &c., insured against were of "the canals, rivers and fires * * * **except-** "**ing perils, losses and misfortunes aris-** "**ing from a want of ordinary care and** "**skill** (such as is common in said navigation) in "lading or navigating said boat or boats."

The loss was by stranding, and the Court reversed the judgment below, for the reason that it should have been left to the jury to say whether there was want of care in the assured (4 Bos., 20). This clearly was *not* an insurance against the carrier's own negligence.

The Massachusetts Cases.

The Court in Phenix Ins. Co. vs. E. & W. Trans. Co. cites:

(1) Commonwealth vs. Shoe & L. D. F. & M. Ins. Co., 112 Mass., 131. This is clearly a miscitation, for the syllabus of it is:

> "When the property of an insolvent insurance "company has been sequestered and placed in the "hands of Receivers, under Gen. St., C. 58, § 6, "the amount of a loss before that time sustained "under a policy of the company can be set off "against a debt due from the assessed to the com- "pany, even if the company holds collateral "security from the debtor."

(2) Jackson vs. Boylston M. Ins. Co., 139 Mass., 508. The policy contained no clause specifically subrogating the insurer to the rights of the insured. At page 511 the Court comments on the difference in that respect between the case before it and the case of Carstairs vs. Mech. & T. Ins. Co., 18 F. R., 473, which it says is readily distinguishable by that important fact, and say (p. 512): "When, therefore, the insured took from the "carrier a bill of lading containing a clause similar to "that which is found in the case at bar (*i. e.*, carrier lia- "ble for loss to have the benefit of the owner's insur- "ance) he made it impossible to do that which he had "in terms agreed in the policy issued to him that he "would do, and was not, therefore, entitled to recover "upon it. While the contract *in terms* made with the "insurer by the insured could not be modified by him, "this presents no reason why he may not modify a right "of subrogation which depends only on his own rela- "tions to the carrier, by changing those relations."

No question arose in the above case as to the carriers' negligence. It is expressly stated that "the bales of cotton insured were destroyed by a fire *the origin and cause of which are unknown*" (p. 509).

The case, therefore, is no authority to the effect that in Massachusetts, where the carrier cannot restrict his liability for his own negligence, he *may* insure such liability.

> The Court further says: "If the carrier *may* "*insure* on his own account he may contract with "the person whose goods he carries that such "person *shall insure* for his benefit. *
>
> "While the question has not been the subject of "discussion in this commonwealth, these remarks "are well sustained by authority elsewhere."

And the three authorities cited are:

Mercantile Ins. Co. vs. Calebs, 20 N. Y., 173.

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* The contrary is the doctrine of the U. S. Courts. The Iladji, 20 F. R., 313; 20 F. R., 875.

(A New York case, where, as above shown, it is permitted to the carrier to contract for exemption from liability for his own negligence.)

Phenix Ins. Co. vs. E. & W. Trans. Co., 10 Biss., 188.

The case which was affirmed in 117 U. S., 312, and which is now being commented on,

Rintoul vs. N. Y. C. & H. R. R. Co., 21 Blatch., 439.

(Judge SHIPMAN *evolved* his decision that the contract was lawful out of his brain and cites no authorities, but merely asserts (p. 443) that, "*the carrier is at liberty* "*to insure his interest in the property entrusted to his* "*care*, and the fact that he may obtain an indemnity "from a third person by means of the owner's policy is "not unfair to the owner, unless the obtaining such in-"demnity is in reality made compulsory upon him.")

The only case cited from the U. S. Courts is the **Baltimore Warehouse Case,** reported as Home Ins. Co. vs. Balt. Warehouse Co., 93 U. S., 527.

The policy was taken out by **warehousemen** and covered "merchandise, their own or held by them in trust, or in which they have an interest or liability," and it was held that the designation of the property as being in a certain warehouse, the policy covered *the merchandise itself* and not merely the claim or interest of the warehouse keeper.

This case is one of the class which deals with the power of a bailee to cover property held by *him in trust.*

See p. 543, where the Court cites Waters vs. Monarch Ins. Co., 5 E. & B., 870; London and N. W. R'way Co. vs. Glynn, 1 Ell. & Ell., Q. B., 652; De Forest vs. Fulton Ins. Co., 1 Hall, 136; Siter vs. Moritz, 13 Penn. St., 219, and says "merchandise held in trust aptly describes "the property of the depositors."

From the above review it will be seen that no case is cited where it was held that a **common** carrier could insure his liability for his negligence by a court which applies the rule that he may not by contract limit or exempt himself from liability for his negligence.

The Court in the Phenix case (117 U. S., at p. 324), said:

> "On the contrary, in one of the earliest cases the "rule that a policy of insurance covers losses by "perils insured against, though occasioned by the "negligence of the servants of the assured, was "judicially affirmed; the assured, being the owner "of a ship, had chartered her for a West India "voyage, and by the usages of trade bore the risk "of bringing the cargo from the shore to the ship; "the policy was upon the boats of the ship, and "upon the goods in them; and the amount re-"covered of the insurer was for goods being car-"ried from the shore to the ship in her boats, and "lost by the wrecking of the boats in consequence "of the misconduct and negligence of some of the "ship's crew."

The case cited in the above extract is that of Walker vs. Maitland, 5 B. & A., 171, and as shown above this is an English decision and has no application in that a **common carrier** was not the person insured. The ship was a chartered ship and her owner was not carrying on the business of a *common* carrier.

III. Another objection made in the Phenix case is founded on the extract from case of Waters vs. Merchants' L. Ins. Co. (11 Pet., 222), (in which the language of LORD TENTERDEN in Walker vs. Monarch Ass. Co., is cited), to the effect that where the loss is *remotely* occasioned by negligence of the crew, *the Court will not inquire as to the quantum of care*, &c., which if used, might have prevented the loss, where Judge STORY commenting on that language uses these words, "His lordship "might have stated the argument *from inconvenience*, "even in a more general form."

If the doctrine of the INCONVENIENCE of the inquiry was made the test to be applied in determining whether indemnity for negligence is to be covered by a policy which in terms covers only sea risks, the answer would be that such contracts are made, and are held valid, and

the inquiry is made in the class of cases where by the terms of the policy the negligence is expressly excepted. Thus in the case above cited of Savage vs. Corn Exch. F. and I. Ins. Co. (4 Bosworth, 3), the Court held that it should have been left to the jury (4 Bos., 20) to say whether the loss was occasioned by want of care in the assured, and (p. 19) the Court says, "The policy " expressly excludes liability for perils, losses and mis- " fortunes arising from or caused by want of ordinary " care or skill in lading and navigating said boat."

" It is undoubtedly true, in general, that where " a loss arises from a peril insured against, the " title of the assured to recover cannot be defeated " by proof of mistake or error in judgment, or even " negligence by the master or mariners employed " in navigating the vessel, which brought the ves- " sel within the peril; not because negligence and " want of skill are perils insured against, but be- " cause, in general, the law looks to the immediate " cause of loss, the peril which is insured against, " and not to the secondary or remote cause, the " negligence (Mathews vs. Howard Ins. Co., 1 " Kern., 3).

" *But parties may specially agree upon a different* " *rule, and this, we think, they did in this case.* " *The defendants excepted a loss arising from want* " *of ordinary care and skill in lading or navigating* " *said boat.* Now suppose the boat had been " laden so heavily as to make the attempt to tow " her on the Hudson River an act of manifest im- " prudence, evincing an entire want of skill or " ordinary prudence, we should not hesitate to " say that the defendants had protected themselves " against the consequences of a loss which, but for " such improper lading, would not have occurred, " although the immediate cause was her encounter- " ing a storm, in which, in that condition, she " could not be kept afloat.

" We are not able to say, upon the evidence, " that the case is so clear upon the question " whether the captain was guilty of a want of

" ordinary care and skill, that the jury should have
" been directed to find for the defendants on that
" ground, or that we should direct a dismissal of
" the complaint, pursuant to the leave reserved
" at the trial. There is some evidence tending to
" show that the conduct of the captain in this re-
" spect was not of the character claimed, and that
" such a condition of the tow was not usual. We
" think that question should have been submitted
" to the jury."

The same principle was laid down in Richelieu vs. Boston M. Ins. Co. (26 Fed. Rep., 596), where the policy *excepted* the incompetency of the master and insufficiency of the crew and want of ordinary care and skill in navigating said vessel and in loading, stowing and securing the cargo on said vessel, and the Court while citing (603) the case of Waters vs. Merchants' L. Ins. Co. (11 Pet., 213), distinguishes it, because in that case the policy contained no exceptions of this kind, and said (604):

" It is only within a comparatively few years
" that the clause *exempting* the underwriter from
" the consequences of negligence has been intro-
" duced into marine policies and hence cases in-
" volving the construction of this clause are not
" numerous; but we take it that wherever, under
" the ordinary form of a policy, the insurer would
" be exonerated from the consequences of a peril
" occasioned by barratry, he would, under this
" clause, escape liability if the peril were occas-
" ioned by the negligence of the master and crew,
" *and that this is a question for the jury in each*
" *case.* Milwaukee Ry. Co. vs. Kellogg, 94 U. S.,
" 469. This appears to have been the construction
" given to a similar provision by Mr. Justice
" Woods in Levi vs. New Orleans Ins. Assn., 2
" Woods, 63, which was an action upon a policy
" to recover a loss resulting from a collision occas-
" ioned by the negligence of the pilot of the in-
" sured vessel."

The same thing was laid down as a principle of law in the case of the "Sidney" (23 Fed. Rep., 88), and although it was reversed (27th Fed. Rep., 119), this proposition was not disputed.

The same principle of law is invariably applied, *and no inconvenience is found in applying it*, when it is sought to render the carrier liable under bills of lading, which except *sea perils*, the Court inquiring in all cases whether the loss was caused by *negligence of the carrier*, although as against an insurer it might be regarded as a sea risk.

This distinction is elaborately considered in "Lawson on Carriers" (Sec. 153, p. 214), as is shown by the following extract:

> "*Terms in Insurance Policies and Bills of Lading Construed Differently.*—Many of the words "and phrases, whose legal meanings are given in "the succeeding sections of this chapter, are also "to be found in policies of marine insurance. But "it is to be observed that words of exemption "contained in bills of lading are more strictly con- "strued than similar terms in the law of insur- "ance. The rules which regulate losses under "policies of insurance differ wholly from those "which govern in the case of common carriers. "Each contract has its own peculiarities and prin- "ciples of interpretation, and the interpretation "given in one case is not applicable and cannot be "followed in the other.
>
> "A striking example of this distinction is seen "in the law of insurance, where, when a loss has "arisen from a cause insured against, the under- "writer is responsible, *although the master did not "use due care to avoid it;* the contrary being the "rule in the contracts of common carriers. 'A "'policy of insurance,' says WILLES, J. (Grill vs. "Iron Screw Co., L. R., 1 C. P., 600; 1866), 'is "'an absolute contract to indemnify for loss by "'perils of the sea, and it is only necessary to see "'whether the loss comes within the terms of the

" ' contract and is caused by perils of the sea;
" ' the fact that the loss is partly caused
" ' by things not distinctly perils of the sea
" ' does not prevent its coming within the con-
" ' tract. In the case of a bill of lading it is dif-
" ' ferent, because there the contract is to carry
" ' with reasonable care *unless prevented by the ex-*
" ' *cepted perils.* If the goods are not carried with
" ' reasonable care, and are consequently lost by
" ' perils of the sea, it becomes necessary to recon-
" ' cile the two parts of the instrument, and this is
" ' done by holding that if the loss through perils of
" ' the sea is caused by the previous default of the
" ' shipowner he is liable for this breach of his
" ' covenant.' In the 'Freedom' (L. R.,
" 3 P. C., 594, 24 L. T. (N. S.), 452
" (1871), it was said by one of the
" Judges, SIR JOSEPH NAPIER, 'The words in the
" ' bills of lading "dangers of the sea" must, of
" ' course, be taken in the sense in which they are
" ' used in a policy of insurance. It is the settled
" ' rule of the law of insurance not to go into dis-
" ' tinct causes but to look exclusively to the im-
" ' mediate and proximate cause of the loss. In
" ' the present case the remote causes are not only
" ' distinct from the proximate cause, but they are
" ' for the most part unconnected with dangers of
" ' the seas.' In the 'Chasca' (L. R., 4 Adm. 446
" 23 L. T (N. S.) 838, 44 L.. J. Adm. 17 (1875), SIR,
" ROBERT PHILLIMORE, a distinguished admiralty
" Judge, refers to the error contained in this extract
" in this language: 'The only question in this case
" ' is whether damage resulting from the barratrous
" ' act of the crew in boring holes in the ship's sides
" ' falls under the exception of "dangers of the
" ' seas" in the bills of lading. The learned
" ' Judge of the County Court has come to the
" ' conclusion that it does, founding his opinion
" ' upon a presumed analogy between cases of
" ' policies of insurance and cases depending upon
" ' contracts contained in bills of lading. This

" ' analogy is in my judgment fallacious. In ques-
" ' tions arising on **exceptions** introduced into
" ' contracts of affreightment, the Court is bound
" ' to look to the real, and not merely as in cases of
" ' marine insurance, to the proximate cause of the
" ' loss. The only authority cited to the contrary
" ' has been a *dictum* in *The Freedom.* * * *
" ' This *dictum* was in no way necessary to the de-
" ' cision of the case before their lordships, and it
" ' appears to me that it was an erroneous *dictum*
" ' that must have found its way through inadvert-
" ' ence into their lordships' judgment.' "

And the same doctrine is illustrated in Woodley vs. Michell (11 Q. B. D., 52), where BRETT, L. J., says :

" Although a collision when brought about
" *without any negligence* of either vessel is or may
" be a peril of the sea, a collision brought about
" by the negligence of either of the vessels, so that
" without that negligence it could not have hap-
" pened, *is not a peril of the sea* within the terms
" of that *exception* in a bill of lading."

Pursuing this distinction the Courts have held that a payment by the insurance company to its insured for a loss as by a peril of the sea, does not estop the insurance company from suing the carrier under his bill of lading and recoving for the same loss as for negligence, although the perils of the sea are excepted by the bill of lading.

The C. D. Jr., 1 Woods, 72.
Sun Mut. Ins. Co. vs. Miss. T. Co., 17 Fed. R., 919.

IV. Another reason suggested in the opinion in the Phenix case why an insurance by the carrier against his own negligence may be valid, is the authority which the Courts have granted him to *limit the value* for which he should be responsible, as was decided in Hart vs. Penna. R. R. Co. (112 U. S., 331). An examination of that case shows that the ground on which it

was put is that **such a limitation does not induce want of care** (340), but makes the care required measurable to the value of the property and proportional to the compensation received for its transit; and the Court there says (341):

> "The carrier must respond for negligence *up to* "*that value*. It is just and reasonable that such a "contract, *fairly entered into*, and where there is "no deceit practised on the shipper, should be "upheld. *There is no violation of public policy.*"

The words of Judge COWEN in Cole vs. Goodwin (19 Wend., 251), show the distinction between *concealing* the true value of the goods carried and then seeking to hold the carrier liable for their *full* value and the effort of the carrier to *escape* liabitity for his own negligence, very aptly. He says:

> "I will only repeat in respect to this case what "seems to me perfectly obvious, and which I have "if not very unsuccessful, made somewhat appar- "ent to others, that the difference between the "two cases from Burrow and East (Gibbon vs. "Paynton and Nicholson vs. Willan), and that of "Evans vs. Soule (2 Maule & S., 1) is, that the no- "tices in the former *went merely to protect against* "*the fraud of the bailor*, and the latter to conceal "and favor fraud directed against the owner and "in favor of the party giving the notice. *The one* "*was for and the other against public morals;* the "former said 'merely give me a *due reward* and I "will be accountable as a common carrier,' the "latter 'gave me the same reward' (for the car- "rier fixes it—it may be less, but it may also be "more), 'and yet I claim to throw *all risk* upon "you, or such a degree of it as I please.' In the "former the plaintiff sought to commit and did "commit actual fraud after express notice that "he must be honest. He sought in that way to *de-* "*prive the laborer of reasonable reward for his hire.* "In the latter, he was paid all he demanded and "yet he refuses to carry under the obligation re- "quired by law."

V. Inasmuch as what is contrary to the policy of law may not be contracted for in any manner either directly or indirectly, and what is so prohibited must be deemed impliedly excluded from every contract, if not *expressly* excluded, it follows that in a policy of insurance against the perils of the sea, and all other perils usually covered by such a policy, taken out by a **common** *carrier*, the risk of the carrier's negligence, are by necessary implication of law excluded with like effect as if therein expressly excluded and no liability for the negligent conduct of the carrier or his servants can be deemed to be covered by such insurance, and that when the policy is read in court, the Court will read between the lines the same words as were found in the cases above cited, of

Savage vs. Corn Exch. F. & I. Ins. Co., 4 Bosworth, 3.

Richelieu vs. Boston M. Ins. Co. (26 Fed. Rep., 596),

and with or without such words in it, in every instance of an insurance by a *common carrier* the question should be left to the jury to say whether the cause of the loss was the carrier's negligence.

Mount vs. Waite, 7 John R., 434.

Lastly. The judgment of the Circuit Court should be reversed and a *venire de novo* awarded.

GEO. A. BLACK,
Of Counsel for Plffs. in Error,
71 Wall St., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1888.

WM. H. INMAN ET AL., PLAINTIFFS IN ERROR,

vs.

THE SOUTH CAROLINA RAILWAY COMPANY,
DEFENDANT IN ERROR.

EXTRACTS FROM BRIEF OF WM. ALLEN BUTLER IN THE CASE OF "THE MONTANA."

GEO. A. BLACK,
Of Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1888.

WM. H. INMAN ET AL., PLAINTIFFS IN ERROR,

vs.

THE SOUTH CAROLINA RAILWAY COMPANY,
DEFENDANT IN ERROR.

The brief of Mr. Wm. Allen Butler, filed in this Court November 4, 1887, in the case of The Liverpool and Great Western Steamship Company *vs.* The Phenix Insurance Company (The Montana), contains a statement of the law which is so pertinent to the case now before the Court, that plaintiffs' counsel has ventured to reprint a portion of it, and to suggest that if the *exigencies* of the defendant's case now require the advocacy of other views that fact should be given its proper weight.

GEO. A. BLACK,
Counsel for Plaintiffs in Error.

UNITED STATES SUPREME COURT.

Nos. 5 and 6.

LIVERPOOL AND GREAT WESTERN STEAMSHIP COMPANY

vs.

THE PHENIX INSURANCE COMPANY.

(THE MONTANA.)

Extracts from Brief of William Allen Butler, filed November 4, 1887.

Page 25, foot of page:

"By contract stipulation the carrier can not only insure "against the consequences of his own negligence, but he "can agree with the owner or shipper of the goods to have "the benefit of any insurance effected by such owner or "shipper *even where his negligence is the cause of the loss.*

"Phenix Insurance Company *vs.* Erie and Western Transportation Company, 117 U. S., 312.

"If it be argued that he should also be permitted to con- "tract directly with the owner or shipper against any lia- "bility arising from his own negligence, the answer is that "the whole matter of exemption by stipulation in the bill "of lading rests in contract, subject to the rules of law.

"Thus while the carrier may agree with the owner "or shipper for the benefit of his insurance, the in-

" surer may by a prior agreement with the owner or " shipper provide that no such stipulation with the " carrier shall defeat the insurer's right of subroga- " tion."

" Carstairs *vs.* Mechanics and Traders Insurance Company, 18 Fed. R., 473.

" The underwriter may require a premium for insuring " against the risk of the carrier's negligence far greater than " the rate of freight charged by the carrier for the transpor- " tation of the goods, and the contracts of freight and of in- " surance stand on different considerations."

* * * (p. 26). " He (the carrier) is just as much " bound to safe carriage of uninsured property as of prop- " erty covered by the most ample insurance."

* * * (p. 29). " It is, doubtless, competent for the " carrier to insure against the loss occasioned by his own " negligence and to agree with the shipper that any insur- " ance which such shipper may have effected on the goods " shall inure to his benefit, even where his own negligence " has caused the loss, thereby defeating the insurer's right " of subrogation **where there is no contravening stip- " ulation in the policy and no bad faith on the part " of the shipper in procuring the insurance.**

" This is understood to be the effect of the decision of this " Court in Phenix Ins. Co. *vs.* Erie & W. Trans. Co., 117 " U. S., 312."

Supreme Court U. S.
FILED.
OCT 10
JAMES H. McKENNEY.

In the Supreme Court of the United States.

No. 86.

WRIT OF ERROR TO THE CIRCUIT COURT.

FOURTH CIRCUIT.

DISTRICT OF SOUTH CAROLINA.

INMANN SWANN & CO.,
PLAINTIFFS IN ERROR.

vs.

THE SOUTH CAROLINA RAILWAY COMPANY,
DEFENDANT IN ERROR.

BRIEF OF ARGUMENT.

THEODORE G. BARKER, ESQ.,
Counsel for defendant in Error.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL CO., PRINTERS,
Nos. 3 and 5 Broad and 117 East Bay Streets.
1888.

IN THE

Supreme Court of the United States.

WRIT OF ERROR TO THE CIRCUIT COURT— FOURTH CIRCUIT, DISTRICT OF SOUTH CAROLINA.

INMAN SWANN & CO., PLAINTIFFS IN ERROR,
vs.
THE SOUTH CAROLINA RAILWAY COMPANY,
DEFENDANT IN ERROR.

BRIEF OF ARGUMENT OF THEODORE G. BARKER, ESQUIRE,

Counsel for Defendant in Error.

STATEMENT OF THE CASE.

The plaintiffs in error, who were plaintiffs below, claimed as shippers of certain bales of cotton against the defendant as common carriers, and sought damages for alleged breach of the contract to safely carry over defendant's own line and deliver to a connecting carrier in course of transportation to place of destination.

The cotton being in five separate lots was alleged to have been received from the agents of the plaintiffs on various days in October, 1883, at various points in the interior of South Carolina, by the Columbia and Greenville Railroad Company "to be transported for the freight money then agreed upon" from the several points of shipment over and by the said Columbia and Greenville Railroad Company and its connecting roads and lines of transportation until delivered

by the plaintiffs at the City of New York, (Transcript Folio, 1, to 5). The complaint further alleged that the several lots of cotton shipped as aforesaid "were in the course of said transportation delivered to and received by the defendant," (the South Carolina Railway Company), "a common carrier and one of the aforesaid connecting lines of transportation in Columbia, South Carolina, to be by the said defendant, for
4 its proportion of the freight money agreed upon as aforesaid, safely carried to Charleston, South Carolina, and there delivered to the next connecting carrier in course of transportation to the place of destination as aforesaid. That said defendant did not safely carry and deliver as aforesaid, the said eight hundred and nine bales of cotton, but on the contrary, whilst the said cotton so received for transportation was in the possession and custody, and under control of the defendant as a common carrier, two hundred and forty-eight bales thereof were, by the carelessness and negligence of the
5 defendant, its officers, agents, and servants, destroyed by fire, to the damage of plaintiffs, &c." (Transcript, Folio 5).

The defendant below in its answer admitted the allegations respecting shipment, names of shippers, place of shipment, and number of bales shipped, but averred, that "at the date of the receipt and shipment of said cotton, bills of lading were given therefor, in which were stated the conditions, stipulations and agreements upon which said cotton should be carried by the Railroad Company receiving it and the connecting roads, which bills of lading, and the conditions, stipu-
6 lations and agreements thereof were received and accepted by the plaintiffs and constitute the contract between them and the defendant." (Transcript, Folio 19).

Defendant further admitted that the cotton came into its hands and was carried to Charleston, the terminus of the South Carolina Railway, and was there stowed in its yards, but that said receipts, carriage and stowing was done by it, "subject to the conditions, stipulations and agreement of said bills of lading." (Transcript, Folio 10).

Defendant admitted, that said cotton was destroyed by
7 fire while in its yards, but denied the charge of negligence.

Defendant in its answer set up as a further defence, the fol-

lowing stipulation in said bills of lading, viz: "And it is further stipulated and agreed, that, in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation, whereby any legal liability may be incurred by the terms of this contract, that the Company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the Company incurring such liability 8
shall have the benefit of any insurance which may have been effected upon or on account of said cotton."

Defendant averred "that plaintiff had fully insured said cotton so destroyed by fire in solvent Companies from risks, among which fire was one, and that at the time of the occurrence of said fire said cotton was fully covered by insurance." but that "defendant had not had the benefit of such insurance, nor have the plaintiffs given, or offered to give, the benefit of such insurance." (Transcript, fol. 11.)

Defendant did not claim exemption from liability from fire 9
under any stipulation of the bill of lading or under the clause exempting from liability from fire on land or on water. Defendant rested the case wholly on the clause entitling it to have from the shipper the benefit of insurance which he had effected on the cotton. Hence the seventh instruction asked for by plaintiffs, as to the scope of the exemption from fire clause in the bill of lading, bore upon no point made or at issue in the cause, and was properly refused to be made a subject-matter of his charge by the Judge. An assignment of error based upon such instruction has therefore no place 10
in this contention.

The proof offered by plaintiffs and furnished by their own witness, Bernard S. Clark, a member of the firm of Inman, Swann & Co., fully sustains the allegation of defendant's answer.

The following must be taken therefore to be the facts proved in the case:

1. That the cotton was received by defendant (below) under and subject to the bill of lading containing the stipulation and agreement of the parties to the contract, "that in case of any loss or damage done to or sustained by any cotton herein 11
receipted for during transportation, whereby any legal lia-

bility may be incurred by the terms of this contract, the Company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton."

2. That plaintiffs had fully insured said cotton so destroyed by fire, in solvent Companies.

3. That defendant has not had the benefit of the insurance
12 so effected.

4. That plaintiffs have not given or offered to give to defendant the benefit of such insurance.

POINT FIRST.

The Circuit Judge was correct in giving, as his charge to the jury, the first instruction asked by defendant, viz: "That the bill or bills of lading, under which the cotton of plaintiffs in this case was transported by the defendant, constituted the contract of the parties, and the plaintiffs are bound by the stipulation that
13 *the defendant Company shall have the benefit of any insurance that may have been effected upon or on account of said cotton."* (Transcript, fol. 110.)

Upon the pleadings and proof defendant was entitled (had it chosen to ask for it) to a Judgment from the Court without submitting the case to the jury, on the ground of *variance.*

Plaintiffs, in their testimony, had shown, that defendant's liability to plaintiffs was not that of a common carrier generally, upon his promise to safely carry and deliver, implied from the fact of receiving the goods, which was the sole
14 cause of action set forth in the Complaint, but that the goods had been shipped by the plaintiffs on the Columbia and Greenville Railroad, on certain bills of lading, constituting in each case *a special contract* between the shipper and the carrier, in which the liability of the carrier and his corresponding duties were fully set forth and declared in express terms, and that defendant's receipt and custody of plaintiffs' cotton had taken place under the operation of that contract, as one of several connecting lines of transportation. Plaintiffs should have declared upon this contract. There was
15 therefore a fatal *variance* between the case made in the Complaint and that made in the proof, by plaintiffs' own witnesses.

"In actions upon contracts the declaration must in all cases state the *contract*, upon which the action is founded, and the *breach* of it. Contracts must be stated in the declaration as they were really made, either in terms or according to their legal effect, and if there be a variance it will be fatal." *1 Tidd's Pr., 434.*

"The principles of the common law are to be understood with the limitation, that there is no special contract between the parties, which varies the obligation of carriers, for if there clearly appears such a contract, *it governs the case.*" (*Angel on carriers, 224, 220*)—*Per, Lord Kenyon*, "when no rate is fixed by law, the carrier is entitled to say on 16
what terms he will carry; he is not obliged to take everything which is brought to his warehouse, *unless the terms on which he chooses to undertake the risk are complied with by the person who employs him.* The old mode of declaring used to be on the custom of the realm; but this is in *assumpsit*, it is founded in *contract*, and the *contract* must therefore, *govern the parties. Anon vs. Jackson, Peake's Add. N. P., Case cited in Angel on Carriers, 220.*

In South Carolina, the State, as it happens, in which the contract in this case was made, and where, so far as defendant was concerned, it was to be performed, it has been always held, that *the bill of lading*, given by a Railroad 17
Company to a shipper, *constitutes the contract*, between the parties, and recently thus, "The bill of lading is the contract between the shipper and the Company, by which the Company agrees to transport and deliver beyond its own lines and *the terms and conditions of the contract regulate* and *determine the duties* and *obligations* of *the contracting parties.* The signature of the shipper is not necessary to establish his assent to the terms of a bill of lading." *Piedmont M'f'g. Co. vs. Columbia and Greenville Railroad Company, 19 S. C., 353.*

In New York it is held that, "On contract for through 18
transportation exemptions inure to connecting carriers although not so expressly provided."

Manhattan Oil Company vs. Camden and Amboy Railroad and Transportation Company, 54 New York, 197.

"The acceptance of the carrier's receipt creates a contract according to its terms between him and the shipper."

Hutchinson on Carriers, 240:

"Accordingly when the owner of the goods accepts a receipt he is conclusively presumed, in the absence of fraud and imposition, to have 19
assented to all the terms and conditions contained in it, which amounts

to a contract with the carrier, and whether called a special, or express contract, or a special acceptance, becomes at once binding on both parties. *Ib. 241.*"

"As in England," says Mr. Hutchinson, "the land carriage of this country is nearly engrossed by railways, canals and express companies, and the usage as to their manner of contracting with their employees is, in effect, the same. When goods are delivered to them receipts are usually given, in which are stated the terms, as to the liability of the carrier, on which they are to be carried, which are treated in all respects
20 as to their legal effect, *as bills of lading;* and it was never doubted, that the bill of lading of the carrier by water, was not only the receipt of the carrier for the goods, but *an express contract* between him and the shipper as *to every exception of liability in it.* * * * * * Every man of ordinary intelligence knows that no individual or Company engaged in the business of carrying to distant places, now undertake to carry his goods, *subject to the old common law liability of the carrier.* He knows, moreover, that bills of lading are constantly given, not only as the evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms; knowing this he cannot be wilfully blind and plead ignorance, when it was his duty to know, and knowing in such cases is assenting. If it was his intention to hold
21 the carrier *to his common law liability,* he should have said so, and have either declined to employ him, or sued him for his refusal, after tendering a reasonable sum for his risk." *Ib. 240.*

In the "*Bank of Kentucky vs. Adams Express Company,*" the Circuit Judge held thus: "If the jury believe that the teller of the Louisiana National Bank presented the bill of lading to the agent of the Express Company for his signature, with the blanks filled, and at such time delivered to the agent the package of money, without disclosing who was the owner of it, but addressed to the plaintiff at Louisville, that the bill of lading was signed and re-delivered to the teller and forwarded to the plaintiff at Louisville, then *the bill of lading thus signed constitutes the contract,* and all the exceptions in it are part of the con-
22 tract, no matter whether each or all of them were known to the Louisiana Bank or not; and the plaintiff is bound by the contract, whether it expressly authorized the Louisiana National Bank to make it or not. The evidence tending to show that the bill of lading was not read at the time of signing, and that nothing was said about the exceptions contained in it, is immaterial."

On writ of error this Court said:

"We find no error in what the Circuit Judge said upon the question, whether the bills of lading, with the exceptions, *constituted* the contract between the parties. The charge in this particular is justified by very
23 numerous authoritative decisions" (citing numerous cases). *Bank of Kentucky vs. Adams Express Company, 93 U. S., 172.*

A faint attempt was made by Bernard S. Clark, one of the plaintiffs, in his testimony to disclaim the bill of lading by saying that he did not authorize the benefit of insurance clause, but on cross-examination he admitted that plaintiffs had made the claim on the Railroad Company under that bill of lading, containing that clause, had received the balance of the cotton and settled the freight under the same bill of lading, that their agent, at time of shipment, accepted that 24
bill of lading, and that he had authority to accept bills of lading. (*Transcript, fol. 32.*)

"The agent of the owner of goods with authority to deliver them to carrier for transportation is to be presumed to have all the necessary power to carry it into effect."

Hutchinson on carriers 265.

No instruction was asked for nor has any exception been taken on the point that the bills of ladiug in this case did not constitute the contract of the parties, or that plaintiffs are not bound by the terms of the same, as special contracts in writing. 25
The plaintiffs should therefore have brought their action upon said contracts, setting forth their terms, and not having done so the variance between the declaration and proof is fatal, and they cannot recover in this action. If this were not so, still the plaintiffs have proved that the goods were carried under the terms of a special contract, and under special conditions, and plaintiff cannot in any form of action recover from defendant outside of those terms and conditions.

POINT SECOND

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The Circuit Judge was correct in making the second instruction prayed by the defendant his charge to the Jury, viz: "That the plaintiffs, before they can recover against the defendants here, must show, that they have performed their part of this contract, by proving that they have given the South Carolina Railway Company the benefit of the insurance, or that they have been ready to perform their contract by tendering such benefit, and that the same has been refused," and in connection with this in giving to the Jury as part of his charge the third instruction asked for, viz: "That if the Jury find that an agreement was made be- 27
tween plaintiffs and their insurers by which the insurers waived

proofs of loss and admitted the claim of plaintiffs to be due by them on the 1st of January 1884, and the plaintiffs agreed to give time upon said claim to the insurers, and mean time to press the claim for the cotton against the South Carolina Railway Company defendant, in consideration of the payment to plaintiffs by their insurers of six per cent. interest, per annum, on said admitted claim, from 1st January 1884, then plaintiffs cannot
28 *recover and verdict must be for defendant.*"

The consideration of the contract, upon which the liability of defendant to pay in case of loss of the cotton by fire depended, was the giving by plaintiffs to the defendants the benefit of the insurance, which had been effected upon, or, on account of the cotton shipped.

The cotton in question had been destroyed by fire, 29th October 1883. Prior to that date, insurance had been effected by plaintiffs upon or on account of said cotton, under open policies dated respectively the 7th September 1883, (Tran-
29 script fol. 63), the 6th September 1883, (Transcript fol. 72), and the 29th August 1883, (Transcript fol. 84). The evidence is, that on the 17th November 1883, the liability of the Insurance Companies to the plaintiffs, for the value of the cotton lost, was acknowledged formally in writing, and the account of estimated loss sustained by the Insurance Company was in accordance with the provisions of each policy, stated between the plaintiffs and their insurers, (Transcript folios 53, 75 and 77.)

It further appears in proof, that an agreement in writing
30 was entered into between the Insurance Companies and the plaintiffs on the 18th January 1884, by which the claim of the plaintiffs upon their insurers was recognized to be due on January 17th, 1884; the plaintiffs agreed to use every effort to collect the claim from the South Carolina Railroad Company; and the Insurance Companies agreed to pay to the plaintiffs "six (6%) per cent. interest from January 17th, 1884 to the time when the claim is collected." (*Transcript fol. 90.*)

It was also proved, that the plaintiffs had not given to the defendant the benefit of this insurance, had not offered to let
31 defendant have the benefit of the same, and had not tendered it, nor had it been refused by the defendant. Having failed

in performing their part, plaintiffs could not, lawfully maintain their action against defendant, upon its part of the contract obligation.

It is a case of a "promise for a promise" "or of mutual promises, where the plaintiffs' promise is executed, but the thing they had agreed to perform was executory." "If, *says Mr. Tidd*," the consideration be executory, the plaintiff cannot bring his action till the consideration be performed." (*1 Tidds Pr. 435.*) Here the plaintiffs had promised, that "in case of any loss or damage done to or sustained by any cotton whereby any legal liability may be incurred by the terms of the contract, the company incurring such liability shall have the benefit of any insurance, which may have been effected upon or on account of the said cotton." 32

By the terms of the contract, then, the defendant Company incurred such "legal liability" the moment when the loss occurred to the cotton. According to the plaintiffs' promise, defendant then became, *eo instanti.*, entitled to have from the plaintiffs the benefit of the insurance, which had been effected. The plaintiffs were, then, under the executed promise to give to defendant the benefit of such insurance, and the thing to be done—the giving the benefit—was executory; and according to the established principle of law above stated, the plaintiffs cannot bring their action till the consideration be performed. 33

"Covenants or agreements are of three kinds; * * * *Thirdly*, there is also a sort of covenant which are mutual conditions to be performed at the same time; and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered, has fulfilled his engagement, and may maintain his action for the default of the other, though it is not certain that either is obliged to do the first act. And where there are mutual promises, yet, if one thing be the consideration of the other, then a performance is in general necessary." *1 Tidd Pr., 437.* 34

"Another distinction to be attended to is, that when mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other." (*Ib. 438*).

"When the conditions are mutual, and to be performed at the same time, the plaintiff must aver that he was ready and offered to perform his part, but the defendant refused to perform his."

"The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties" per Lord Mans- 35

field, in *Kingston vs. Preston*, cited in *Jones vs. Barclay, Douglass, 490.* Where two acts are to be done at the same time as where A covenants to convey an estate to B on such a day, and in consideration B covenants to pay a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act." *Pordage vs. Cole, 1 Wms. Saunders, 310, Note by Sergeant Williams.*

In this case, the contract in effect was, that the defendant
36 would, in case of loss by fire, be liable to plaintiffs for the damage to said cotton, in consideration that plaintiffs should give to defendants so liable, the benefit of any insurance, which may have been effected upon the cotton so damaged. Upon plaintiffs bringing action to enforce the liability of defendant to make good the loss on the cotton, destroyed by fire, arising out of the promise, it was in law necessary to their recovering, that they aver and prove, that they were ready and had offered to perform their promise, viz: that defendant shall have the benefit of the insurance effected upon
37 or on account of said cotton.

The defence, under the special contract proved in this case, it will be noticed, is not one, like the case of stipulations contained in carrier's "*Notices*," nor even like that under exemption clauses in bills of lading which seek to restrict the common law responsibility of the carrier as insurer of the safety of goods committed to him. It is not like the defence under the clause, for example, exempting the carrier from loss by fire. Such cases assert the carrier's right, by such "notices" or "exemption clauses" to restrict the common law liability
38 as insurer, and might be plead in defence to an action upon the common law liability. Nor is this a case of a stipulation on the part of the carrier for immunity from his own negligenee, nor one, that the carrier shall not be liable, as carrier, but only, as bailee.

In this case we have *a special contract*, which does not pretend to limit the common law liability of the carrier growing out of his exercise of a public employment, which liability and character the Courts are jealous to maintain. The contract, here, preserves the liability of defendant as insurer of
39 the goods, but, admitting and assuming its liability therefor, defendant makes with the shipper a special agreement look-

ing solely to the settlement of that liability. The contract is "in case any legal liability may be incurred by the terms of this contract, the Company incurring such liability, shall have the benefit of any insurance." It is in effect a contract as to now the parties shall adjust or settle the liability in case it shall be incurred. The defendant in effect, says, "I agree to be liable to you for the cotton destroyed by fire in my yards, provided you agree to give me the benefit of the insurance you shall have effected." And the plaintiffs by their contract, say, "In case you incur a liability to me for loss of this cotton by fire I will give you any insurance I may have effected upon said cotton." It is a contract of "mutual promises" involving and establishing the basis of *settlement of a mutual account, in case of loss.* It was the palpable contemplation of the parties, that this promise, to give the insurance, would be performed, *at the same time*, that the liability, for the cotton burned, was to be discharged, by payment of the loss.

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This contract, *ex vi termini*, entitles the carrier in the event of loss by fire, when the liability incurred by him is sought to be enforced, to set off his claim to the insurance, or, rather, to say to the plaintiff, who sues him upon his contract liability, and promise for the value of the cotton burned, "you have not performed or offered to perform your promise to me, contained in the bill of lading, you have not given or offered to give me the insurance you have effected on this cotton, for which you are suing me. Unless you do so, you cannot maintain your action." It is what the French law calls "a *commutative* contract, involving mutual and reciprocal obligations, where the acts to be done on one side form the consideration for those to be done on the other," and "it would seem to follow," says Judge Story, "upon principles of natural justice, that, if they are to be done, at the same time, neither party could claim a fulfilment thereof, unless he had first performed, or was ready to perform all the acts required on his own part." *Hyde & Gleises, vs. Booraem & Company, 16 Peters, 169.*

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POINT THIRD.

The stipulations in the bills of lading giving the defendant the benefit of insurance effected by the plaintiffs are "not unreasonable, contrary to public policy and the duties and obligations imposed by law upon carriers, and therefore void," as is claimed in plaintiffs' first exception.

44 These exceptions to the like stipulations, in similar bills of lading to those proven in this case, were met and answered, in the recent decision of this Court in "*Phœnix Insurance Company vs. Erie Transportation Company*," which held, that "No rule of law or of public policy is violated by allowing a common carrier like any other person having either the general property or a peculiar interest in goods to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. By obtaining insurance he does not diminish
45 his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility.

As the carrier might lawfully obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance, voluntarily obtained by the latter. This stipulation does not, in terms or effect, prevent the owner from being reimbursed the full value of the goods; but, being valid as between the owner and the carrier, it *does prevent* either the owner himself, or the insurer,
46 who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation." *Phœnix Insurance Company vs. Erie Transportation Company, 117 U.S., 312.*

In the face of so clear a ruling, it would be an abuse of the patience of this Court to discuss the matter further.

The points upon which Mr. Justice Bradley dissented in the case of the Phœnix Insurance Company vs. Erie Transportation Company, 118 U. S., 218, do not arise in this case. The contract between the owner of the goods and the carrier
47 is alone discussed here. The rights of the shipper's insurer are not involved in this case.

The above ruling disposes effectually of the plaintiffs' other exceptions. (N. B.—It is due to the counsel, who conducted the case of plaintiffs in the Circuit Court, and who prepared the exceptions in this writ of error, to say that they were prepared before the decision in the case above quoted was decided by this Court.)

POINT FOURTH.

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The second exception of plaintiffs is that the Circuit Judge erred in not instructing the jury, "That if the stipulation in the bills of lading under which the cotton of the plaintiffs was to be transported by the defendant giving to the carrier the benefit of insurance is valid, then such stipulation only entitles the defendant to such insurance upon payment by it of plaintiffs' loss unless the plaintiffs have already been paid by the insurer." Defendant contends that this refusal was not error.

If it were necessary, it were a sufficient answer to this exception to say, that the plaintiffs have, by their own proof, 49 shown that they have been virtually paid, or have been so absolutely secured to be paid, by the Insurance Companies as actually to occupy the position of lenders of the insurance money to their insurers, upon an investment, bearing six per cent. interest, from the date, when the insurance money was, in an account stated in writing, acknowledged to be due and promised to be paid, unconditionally, by the Insurance Companies to the plaintiffs. (The only condition of the agreement of settlement (which we have already quoted), is, that the plaintiffs shall sue the carrier, and use every effort to collect 50 the claim from the defendant. This, however, it is stipulated between them, is *not to prejudice the plaintiffs' claim against the Insurance Companies.*) (Transcript, fol. 90.)

The plaintiffs are, therefore, estopped from saying that they have not been, in effect, paid by the insurers. The stipulation of the bills of lading that the defendant (carrier) shall have the benefit of that insurance, in the language of the decision of this Court, above quoted, "does prevent either the owner himself" (the plaintiffs here) "or the insurer from maintaining an action against the carrier upon any terms 51 inconsistent with the stipulation." If, as the exception

assumes, the stipulation entitles the defendant to such insurance upon payment by it of plaintiffs' loss, no Court of Justice would compel the defendant to the onerous and empty ceremony of paying the loss to the plaintiffs when, *eo instanti*, upon such payment, the plaintiffs would be bound in law to repay the same money to the defendant. It would violate all the principles and practice of mutual accounting. In point of
52 fact, as we have shown above, the obligation of the plaintiffs to the defendant is not, by the terms of the stipulation, made to wait upon defendant's paying the loss. The language of the contract is, that "in case of loss, whereby any legal liability *may be incurred*, the Company, *incurring such liability*, shall have the benefit of the insurance." It does not say "the Company paying such loss," but "the Company incurring such liability." So soon as the liability is incurred, *eo instanti*, the Company "shall have the benefit" of any insurance which the owner may have effected. By the time the owner of the
53 goods comes to claim payment for the loss, the insurance money, due to the carrier, has already become a pre-existing debt of such owner to the carrier.

Just as soon as the shipper of the goods is in position to claim payment for his loss, so soon as the liability of the carrier has been incurred, all policies of insurance which may have been effected by such shipper and all the benefits which he may have derived, and all to be derived by him, therefrom, become transferable to the carrier. The shipper holding such policies or deriving such benefits therefrom, holds them for
54 the use of the carrier. Before he can enforce his claim on the carrier he must show, either that he has allowed the carrier credit therefor, or that he has done all in his power to secure them for the carrier, or that he has placed or offered to place the carrier in his shoes, with full opportunity of making his claim by transferring or offering to transfer to him his policies, with all such information as will enable the carrier intelligently to make his claim.

Note. The contract is that the carrier "*shall have* the benfit of any insurance &c." "Benefit" means a result; a good
55 result. That is to say the effect of an act. And an act to be done by the shipper, the result of which will aid the carrier

in meeting the liability incurred so soon as it is incurred. So soon as the carrier shall incur the liability under the bill of lading, the shipper will actively aid in furnishing the means of satisfying such liability, by placing in its hands all benefits, in action or possession, derived or to be derived by the shipper from any insurance effected by him on the goods shipped. This action on the part of the shipper is essential before he can demand satisfaction from the carrier. He cannot say, pay 56
me and then if you choose, you can take what I have to give you. He must show that he has acted, not that he has been successful, but that, at all events, he has given the carrier the benefit of all that he has. One test of this is as follows: Suppose that the shipper has effected insurance in a Fire Company, upon a policy under which no question could arise upon proof of destruction by fire. Suppose that the shipper violated one of the conditions, prescribing conduct after loss has occurred; say, in giving timely notice, or in producing proofs of loss in proper form or in proper time, or in bringing his 57
action within the period limited in the policy. Can he be allowed, notwithstanding, to bring his action and recover against the carrier? If not, how can the carrier be protected, if he be forbidden to show, that the shipper has effected insurance on the goods, and has not actively given him the benefit thereof. If the Court shall say, "pay first, we will inquire into that afterward," it will practically forbid such evidence. Again. The shipper is to give the carrier all the benefit of insurance &c. It is wholly within the knowledge of the shipper whether he has effected any insurance at all 58
—the place of such insurance, its terms, its amount, the present condition of the credit of the insurer; and this knowledge is exclusively the knowledge of the shipper. How can the carrier obtain the first step toward getting the benefit of the insurance? Only from the shipper? When is he to get this knowledge? When the shipper comes with the gross amount of his claim. If he then make no inquiry, or make his settlement without getting the benefit of all insurance effected by the shipper, and the contract of carriage, a complete contract, be marked satisfied, is he not defeated of his con- 59
tract right?

POINT FIFTH.

The plaintiffs' third exception is that the Circuit Judge erred in not instructing the Jury, "that if the stipulation in the bills of lading under which the plaintiffs cotton was to be transported by the defendant giving to the carrier the benefit of plaintiffs' insurance is valid, then such stipulation only entitles the defendant to such
60 *insurance as is in the hands of the plaintiffs, and if the policy is void or unproductive, this is no defence and the plaintiffs are entitled to recover in this action." Defendant contends that the refusal was not error.*

Even if the policy could be shown to be void or unproductive the plaintiffs are not entitled to pronounce judgment to that effect upon it. The Courts, alone, upon an issue legally framed between proper parties, could so declare; until such judgment, it must be presumed to be valid and productive.

The owner who contracted with the carrier, that the latter
61 "shall have the benefit of such insurance," would be bound before any Court of Justice to maintain the validity of the insurance policy against the attempt of his insurer to assert that it was void. The obligation of the stipulation in the bill of lading binds him to the carrier to defend the policy if it is attacked. His contract pledge is, that the carrier "shall have the benefit of the insurance." If he failed to make an issue, or if, in an issue made with his insurer, he should falter, or yield to the attempt of his insurer to escape from his contract, he would forfeit his pledge to the carrier and fail in
62 his contract duty. Conduct on his part tending to such a result, as to impair or defeat the policy, would, in equity, be regarded as fraudulent, and would forbid his enforcement against the carrier of the latter's liability to him, and a Court of law would not permit him to enforce against the carrier a contract, the obligations of which he himself had failed to perform in its substance and spirit.

But, by the proof in this case, these plaintiffs are absolutely estopped from saying, that these policies, which the insurers, since the loss, have recognized as valid, under
63 which they have accepted proofs of loss, and have agreed to pay the loss, are void. So, by the same proof, they are

conclusively estopped from saying, that they are unproductive.

The Circuit Judge could not have granted the instruction prayed for, without assuming that as true, which was proved not to be the truth, viz: that the policies were void or unproductive, and committed no error in refusing it. Moreover, it is clear, that no such questions are involved, or could be discussed in this action. The Circuit Judge could not with 64
propriety be asked to base a legal proposition upon the hypothesis, that the insurance was void or unproductive, when there is issue as to its validity or productive character. The instruction asked for, if granted, would have been simply misleading and confusing.

POINT SIXTH.

The plaintiffs' fourth exception is, that the Circuit Judge erred in not charging the jury, "That if the stipulation in the bills of lading under which the plaintiffs' cotton was to be 65
transported by the defendant giving the carrier benefit of insurance effected by plaintiffs is valid, then no legal obligation arose therefrom that the plaintiffs should effect valid insurance, and if such insurance is invalid, this is no defence to plaintiffs' action." The instruction here prayed, like the previous prayer of plaintiffs, involved the Court in the assumption that the insurance was invalid, and required the Circuit Judge, in granting it, to suggest to the jury that, as a fact, which the proof showed not to be the truth. The Circuit Judge correctly refused to give such instruction. The 66
plaintiffs fifth exception, is that the Circuit Judge erred in not instructing the jury, "*That as the plaintiffs under the stipulations in the bills of lading giving the carrier benefit of the insurance, may or may not have insured as they please, the defendant takes such insurance if effected subject to all infirmities, and this constitutes no defence to plaintiffs' action.*"

It might be enough to say in answer to this instruction that the defendant cannot be said to take such insurance, until it is given or offered to him, which has not been done, and that it will be time enough to talk of "infirmities," when 67
the plaintiffs shall have given defendant the benefit of it, but

the vice of the instruction, as asked for, consists, as in the last two, in the attempt to commit the Court to the assertion, that there are infirmities in the insurance, against the clear proof in the case.

"A charge founded on a hypothetical state of facts of which there is no evidence is erroneous."

U. S. vs. Breitling, 20 How., 252.

68 "An instruction which assumes the existence of facts of which there is no evidence is misleading and erroneous."

R. R. Co. vs. Houston, 95 U. S., 697.
Jones vs. Randolph, 104 U. S., 108.

"Requests to charge which overlook facts of which there is evidence, or assume, as proved, facts of which there is no evidence, properly refused."

Lucas vs. Brooks, 18 Wall., 436.

69 The same reply which we have made above to the third exception applies to the fourth, fifth, and sixth, and we need not repeat it.

POINT SEVENTH.

The plaintiffs sixth exception is to the refusal of the Circuit Judge to charge as follows, viz: "*That the carrier does not lose his character as carrier, by reason of a stipulation giving him the benefit of insurance by the shipper or owner, and*
70 *that as carrier he is primarily liable for loss or damage, if not arising from causes exempted by law or his contract, and if the defendant desires the benefit of plaintiffs' insurance, it must first pay the loss sustained by them.*"

We think we have fully, in our previous argument, met and answered the position here taken. We have shown that the stipulation in the contract does not touch or diminish the carrier's character or liability, as carrier, but that it admits and assumes such liability to exist, and to have been incurred, and that, because it has been incurred, it demands as
71 a part of plaintiffs' express contract with defendant, that the defendant *shall have* the insurance, as a pre-requisite not to

defendant's liability as carrier—but to plaintiffs' right of action and recovery against defendant on the contract, whose terms are embodied in the bills of lading.

LASTLY.

The plaintiffs seventh exception is that the Circuit Judge erred in refusing to charge the jury, "*That the defendant under the bills of lading in question, are not exempt from loss by fire, as such exemptions under said bills of lading only apply to the carrier by water.* 72

If the defendant had set up any claim to exemption from loss by fire, under the bills of lading, there might be pertinence or applicability in this instruction, but, as we have said before, defendant made no such claim, and the point was not in issue in the case. The Circuit Judge correctly refused to charge the jury, in a way, which must necessarily have misled the jury as to the points at issue and submitted to them for their determination. 73

THEODORE G. BARKER.
Counsel for Defendant in Error.

Theodore G. Barker

Supreme Court of the United States,

OCTOBER TERM, 1888.

WM. H. INMAN, ET AL., PLAINTIFFS IN ERROR,

vs.

THE SOUTH CAROLINA RAILWAY COMPANY,
DEFENDANT IN ERROR.

REPLY OF PLAINTIFFS IN ERROR TO BRIEF OF DEFENDANT IN ERROR.

GEO. A. BLACK,
Of Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

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DEFENDANT IN ERROR.

REPLY OF PLAINTIFFS IN ERROR TO BRIEF OF DEFENDANT IN ERROR.

FIRST. The defendant's first point (p. 4 of brief) is that there was a *variance*, because the bills of lading were not set forth *as the contract* sued on.

A sufficient reply would be that *no such point* was made in the court below, where an amendment would have cured such supposed defect, if it existed.

Sec. 954, R. S. of U. S.

R. R. Co. *vs.* Linsay, 4 Wall., 656.

"The other error insisted upon is that there is a fatal "variance between the facts as found by the court and by "the case made by the plaintiffs' petition. * * * It was "in the power of the court to permit the petition to be "amended, and the proper amendments would, doubtless, "have been made if the objection had been stated. It is

"presented for the first time in this Court. Under these "circumstances it must be held to have been waived by the "plaintiffs in error in the court below, and they are con- "cluded by that waiver in this Court."

And the Court cites the provision of the judiciary act of 1789, which is incorporated in § 954 of R. S., and says (p. 657): "The effect of this provision is decisive."

But thec omplaint set forth so much of the contract as was necessary for the plaintiff to aver.

It alleges that the Columbia and Greenville R. R. Co. *received* bales of cotton to be transported by it and its connecting roads until delivered to the plaintiffs at New York, and expressed the consideration "for the freight money then agreed upon" (p. 1, fol. 3), and that the cotton was delivered to the defendant, a common carrier, to be by it, for its proportion of the freight money agreed upon, safely carried to Charleston, and there delivered to the next connecting carrier, and that defendant did not safely carry and deliver (p. 2, fol. 5).

This Court has determined that the obligations and *liabilities* "of common carriers are not dependent upon contract, "though they may be modified and limited by contract; "they are imposed by the law from the public nature of his "employment."

Hannibal R. R. *vs.* Swift, 12 Wall., 262.

Other courts say the same.

Bretherton *vs.* Wood, 3 Brod. & Bing, 54.

"A breach of this duty is a breach of the law, and for this "breach an action lies founded on the common law, which "action needs not the aid of a contract to support it."

Atlantic Mu. Ins. Co. *vs.* McLoon, 48 Barb., 27.

"No debt arises from the negligent loss of goods by a "common carrier. * * * He is held liable for neg- "ligence **not from any contract against negligence,** but "because such a loss arises from a breach of duty imposed by "the trust or agency he has assumed. * * * The negli- "gence is in the nature of a tort, not much less culpable "than it is for one carelessly to injure or destroy the prop- "erty of another."

Phil. & R. R. R. Co. *vs.* Derby, 14 How., 483.

"This duty does not result alone *from the consideration* "*paid* for the service, it is imposed by law even when the "service is gratuitous."

Seybolt *vs.* The N. Y., L. E. & W. R. R. Co., 95 N. Y., 574.

The Quickstep, 9 Wall., 665.

"The libel was not filed for a breach of contract, as is "contended, **but to obtain compensation for the com- "mission of a tort."**

"It is true it asserts a contract of towage, but *this was* "*done by way of inducement to the real grievance complained of,* "which is the wrong suffered by the libellant by the care- "lessness and mismanagement of the captain of the Quick- "step."

SECOND. The defendants second point (p. 7 of brief) deals with the *consideration* of the *contract* expressed in the bills of lading.

This question of the **consideration** paid by the carriers for receiving the benefit of the insurance is a *puzzler for the defendant's counsel.*

He puts it (p. 8.) "The consideration of the contract "**upon which the liability of defendant to pay** in case

"of loss of the cotton by fire, **depended,** was the giving by "plaintiffs to the defendants the benefit of the insurance "which had been effected upon or or account of the cotton "shipped."

The trouble with the foregoing proposition is that it is not true.

The liability of defendant to pay depended upon *its liability as common carrier,* and was just as binding whether the owner agreed to give the insurance or not. It is a curious sort of *consideration* on which to base the liability of the carrier to pay, *when the owner is not* **bound** *to insure,* and when the liability of the carrier to pay is just the same whether there is any insurance in fact or not.

The statute of South Carolina provided—

"No public notice or declaration or special contract shall "limit or in anywise affect the liability at common law of "any railroad company within this State, for or in respect "of any goods to be carried and conveyed by them; but "such railroad company shall be liable as at common law to "answer for the loss of or injury to any articles and goods "to be carried and conveyed by them, any public notice or "declaration or special contract by them made and given "contrary thereto or in anywise limiting such liability "notwithstanding."

R. S. South Carolina, 1873, Ch. 65, § 2.

See Platt *vs.* Richmond, Y. R. & C. R. R. Co., 108 N. Y., 362, where the above statute is extracted, and brief of Wm. Allen Butler at p. 360.

The principle of law applicable to such cases is expressed in Vanderbilt *vs.* Schreyer (91 N. Y., 401), as follows:

"Pollock states the rule as follows: That 'neither the "promise to do a thing nor the actual doing of it will be a

"good consideration if it is a thing which the party is "bound to do by the general law or by a subsisting contract "with the other party,' (Pollock on Principles of Contract, "161; Crosby *vs.* Wood, 6 N. Y., 369; Deacon *vs.* Gridley, "15 C. B., 295). Nor is the performance of that which the "party is under a previous valid legal obligation to do a "sufficient consideration for a new contract. (2 Parsons on "Contracts, 437.)

"Where certain sailors had signed articles to complete a "voyage, but at an intermediate port refused to go on, and "the captain thereupon promised to pay them increased "wages, it was held that the promise was without consid- "eration (Bartlett *vs.* Wyman, 14 Johns, 260). A firm hav- "ing a contract to build a railroad found the contract "unprofitable, whereupon the railroad company prom- "ised if they would go on and complete the contract they "would repay to the contractors all of the obligations which "they had or would incur in consequence of their com- "pletion of the work. Held, *no* consideration. (Ayers *vs.* "The C. R. I. & P. R. R. Co., 52 Iowa, 478.)"

The court cites from a large number of other cases to the same effect. They are—

Conover *vs.* Stillwell, 34 N. J. L., 54.
Reynolds *vs.* Nugent, 25 Ind., 328.
Harris *vs.* Carter, 3 Ellis and B., 559.
Still *vs.* Myrick, 2 Camp., 317.
Mallalieu *vs.* Hodgson, 16 Ad. and E., N. S., 689.
Smithett *vs.* Blythe, 1 B and Ad., 514.

In Seybolt *vs.* N. Y. L. E. and W. R. R. Co., 95 N. Y., 574 the court says:

"The defence must therefore rest upon the proposition "that a person to whom is secured an absolute statutory "right to transportation over a railroad forfeits his right to

"damages for an injury inflicted upon him through the neg-
"ligence of such railroad corporation by the voluntary ac-
"ceptance of a voucher containing provisions intended by
"the corporation to exempt it from liability for its negli-
"gence, although the person receiving it supposed it was in-
"tended solely to facilitate the enjoyment of his right of
"transportation. We are of the opinion that the agent's ac-
"ceptance of the pass under the circumstances of this case
"did not indicate an intention to assent to the provisions
"therein contained, *and even if it might be so construed that the*
"*want of a consideration for such an agreement rendered it*
"*nudum pactum.*"

As Judge Bradley says, in the Phenix case, in his dissenting opinion (118 U. S., 210)—

"The carrier would thereby protect himself against the
"consequences of his own negligence and compel the in-
"surer to indemnify him **without paying** any **premium.**"

THIRD. Defendant's third point (p. 12 of brief), is that the case of Phenix Co. *vs.* E. & W. Trans. Co. effectually forecloses all discussion of the validity of the clause in question. It is respectfully insisted that this is not so; so long as men exist courts can err, and until the attribute of "infallibility" is granted, the right to show fallibility will be claimed and granted by all courts in all civilized communities.

Such language as Judge Bradley uses when speaking of the effect of this clause is not often uttered on the bench. He says: **"It seems to me this is both contrary to law and justice,"** and such words stand as an accusation against this decision, which, at least, justifies a reconsideration of it.

FOURTH. The defendant's fourth point (p. 13 of brief) deals with the plaintiffs' proposition that "*unless* the plaintiffs had

been paid by the insurer *then* the stipulation only entitles the defendant to such insurance as plaintiffs had, *upon payment* by it (the carrier) of plaintiffs' loss.

The defendant had already, (on p. 9, fol. 32 of brief,) construed the contract in these words:

"By the terms of the contract, then, the defendant com-
" pany *incurred such 'legal liability'* **the moment when the**
" loss occurred to the cotton."

On what legal principle can defendant postpone the payment of the liability it *then* incurred? It has no right to say to plaintiffs, " Wait the thirty days which have got to elapse after you have proved to the insurance companies that you have sustained a loss which, by their contracts of insurance, they have agreed to indemnify you against."*

Why wait thirty days when the defendant's " legal liability " is incurred the moment when the loss occurred?

On page 14 (fol. 51) defendant's counsel speaks of the plaintiffs' obligation "to repay the same money to defendant."

He forgets that "payment" must precede *re*-payment, and on the same page (fol. 53) where he says "the insurance " money due to the carrier has already become a *pre-existing* " *debt* of such owner to the carrier," he quietly ignores the fact that there is no insurance *money*, and that it is only insurance *contracts* that the owner has.

FIFTH. The defendant's fifth, sixth, and seventh points present nothing requiring any further answer than to say that the policies of insurance were before the court below

* See policy for thirty-day clause. Record, p. 28, fol. 58.

and are here for construction, and that they require that they should be construed as they read—that they did not in in this case protect the plaintiffs against this loss, and that the defendant has a right (if it has any right) to only the contracts in the form they existed when the fire occurred, and all subsequent bargains do not accrue to defendant.

Respectfully submitted,

GEO. A. BLACK,
Of Counsel for Plaintiff in Error.

FILED.
OCT 27 1888
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, APPELLANT,
vs.
JOHN G. FOSTER.
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APPEAL FROM THE COURT OF CLAIMS.

STATEMENT AND BRIEF OF ARGUMENT FOR APPELLANT.

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STATEMENT AND BRIEF OF ARGUMENT FOR APPELLANT.

STATEMENT.

This is an appeal from a judgment rendered by the Court of Claims against the United States in favor of John G. Foster for the sum of $836.71.

Prior to November 28, 1861, Foster served in the navy six years and forty days as an enlisted man. He was appointed gunner in the regular Navy November 28, 1861, and served until April 14, 1868, a period of six years one hundred and forty-four days, when his resignation

was accepted. He received his last appointment as gunner December 27, 1869, under which he has since served continuously.

Under the longevity-pay clauses of the naval appropriation acts of August, 1882, and March, 1883 (22 Stat., 287–473), he had been allowed credit for prior service upon his second warrant as gunner from the 27th of November, 1861, for the full period of twelve years one hundred and eighty-five days.

The act of 1882 (22 Stat., 287), is as follows:

> And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers.

The act of 1883 (22 Stat., 473) designates the manner in which the benefits provided by the act of 1882 shall be credited, to wit: "In the lowest grade having graduated pay held by such officer since last entering the service."

The claimant contended that the act of 1884 only modified the act of 1882 in describing the grade in which the benefits should be credited. That whereas, both in the first and second terms of service, he had served as a gunner in the regular Navy, he would be entitled under the terms of the longevity-pay acts (*supra*) to additional pay for his first term of service whilst holding the position of gunner.

It was contended on behalf of the Government that claimant has no status in the Navy dating back of his present appointmen; that he is entitled to have and receive all the benefits of length of service as if all said service had been continuous and in the regular Navy, but that such benefits must be received under his present status as an officer in the Navy. It was contended that the act did not confer pay for another period of service, but to increase the pay of the present period by reason of length of service.

It is admitted that if claimant is correct in his interpretation of the law of 1883 he is entitled to the judgment of $1,393.40 rendered by the court. If the accounting officers are correct, he has been fully paid. The decision of the court below was in favor of claimant.

ASSIGNMENTS OF ERROR.

The court erred—

(1) In finding as a conclusion of law that the claimant should recover the sum of $1,393.40.

(2) In finding any amount to be due claimant.

(3) In rendering a judgment in favor of claimant and against the United States for $1,393.40.

ARGUMENT.

The benefits of the longevity-pay acts of 1882 and 1883 are limited to "officers of the Navy." It is by virtue of his last entry into the Navy that he is entitled to credit. Prior to such entry he was out of the service. (*Bennett's Case*, 19 C. Cls. R., 379.)

It follows, therefore, that it is by reason of claimant's last appointment that he is entitled to credit for longevity pay. It can hardly bee ontended that, without a new appointment after his resignation in 1868, he could have claimed for prior service. He was not until such appointment an "officer of the Navy." He had been paid in full.

He therefore claims the benefit of the act of 1883 by virtue of his appointment in 1869. It is by virtue of such appointment that he was an officer of the Navy at that time. It is in the lowest grade having graduated pay held since last entering the Navy that he is entitled to its benefits. The rank he held in the Navy previous to that time is immaterial. He might have been an enlisted man or a commodore. In either event his whole service must be counted in the lowest grade having graduated pay since his last entry into the service.

Claimant is entitled to have credit in his present service—that service under which he holds his rank—for his whole service, as if continuous. But he has no present status in the Navy that dates back of his last entry.

In his right as an officer, holding a position as such by his appointment in 1869, he has been credited and paid for his entire service of upwards of twelve years as an enlisted man in all respects as if such service had been continuous and in the regular Navy.

It is not contended that the act of 1883 is not retroactive, as construed in *Hawkins* vs. *The United States* (19 C. Cls. R., 611), cited by the court. It is admitted that he is entitled to pay for his whole length of service under his present appointment. This he has received. There is

nothing in Hawkins's Case, *supra*, to warrant additional pay under another appointment and different period of service.

Nor is there anything in *Rockwell's Case* (21 C. Cls. R., 332), cited by the court, to warrant the judgment in the case at bar. It is there held that additional pay was expected to follow the credit for length of service; but such pay, in Rockwell's Case, was credited in the lowest grade having graduated pay held by such officer since last entering the service. The point in the case at bar was not at issue in that case, and was not decided.

It is respectfully submitted that as claimant has, as an officer of the Navy under his present appointment, been credited with his entire length of service and so paid, the judgment of the court below should be reversed, with directions to dismiss the petition.

ROBERT A. HOWARD,
Assistant Attorney-General.
F. P. DEWEES,
Assistant Attorney.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 1162.

THE UNITED STATES.

vs.

JOHN G. FOSTER.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

ROBERT B. LINES,
JOHN PAUL JONES,
Counsel for Appellee.

Thomas McGill & Co., Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term 1887

THE UNITED STATES
vs.
JOHN G. FOSTER. } No. 1162.

Appeal from the Court of Claims.

Statement and Brief for Appellee.

The appellee in this case has had three terms of service in the regular navy—one of six years and forty days as enlisted man; a later term of six years and one hundred and forty-five days as a warrant officer, viz., gunner; and a third term as gunner, in which he is now serving.

Under the Treasury construction of the longevity-pay clause of section 1 of the Naval Appropriation Act of August 5, 1882, as shown in the opinion in United States *v.* Rockwell (120 U. S., 60), he was entitled to credit for his first term of service as gunner as though it had been continuous with his second term, and to receive in his second term the increased pay resulting from such credit (under section 1556 Revised Statutes). But under that construction he could receive no credit at all for his time as enlisted man, although the act of 1882 expressly directed enlisted service to be credited. The trouble

being that, in the navy, an officer's pay (under section 1556 R. S. and prior laws) was graduated in each grade from the date of his commission or warrant thereto, and the accounting officers holding that they could not, without more specific direction, count enlisted service as though it had been rendered in any particular grade which the enlisted person might afterwards hold as an officer, a clause was inserted in the Naval Appropriation act of March 3, 1883, to remedy the difficulty. This clause, quoted in full in the Rockwell case, as also in the opinion of the lower court in the case at bar, provides in substance that all service—enlisted or as an officer, regular or volunteer, army or navy—should be counted as though it had been rendered "in the lowest grade having graduated pay held by such officer since last entering the service." (There was an additional *proviso* prohibiting increase of pay *during* volunteer service, but it has no application to this case, since all appellee's service was as a regular.)

In applying the act of 1883 to the case of appellee, whose lowest (and only) "grade having graduated pay" was the grade of gunner, the accounting officers credited him, upon his second warrant as such, with the twelve years and more of his prior service as gunner and enlisted man, but refused him credit on his first warrant for his six years' and forty days' enlisted service. In this it is claimed that they erred, and the court below so decided.

It is clear that if all appellee's service had been continuous and in the grade of gunner, his pay, under his first warrant, would have been increased, since the laws in force during that period of his service (12 Stats., 26, 586) graduated a gunner's pay according to length of service. The amount of such increase is stated by the Treasury at $1,393.40, for which the judgment below was entered.

The theory on which this sum was denied appellee would seem to be that the act of 1883 confined the in-

crease of pay to the period "since last entering the service." Examination of the legislation on the subject will show that that theory is in conflict with both its language and obvious intent. The mandate of the act of 1883 is that all service shall be credited "not in the lowest grade having graduated pay," but *as though it had been rendered in that grade.* Having first found what that grade was, it was the duty of the accounting officers not merely to credit the time of all prior service upon it, but to examine the claimant's whole record, ascertain what benefits of longevity pay would have accrued to him (whether after or before his last entry), if all his service has been continuous and in that grade, and then to allow him such benefits.

Suppose when the act of 1883 was passed the appellee had served twelve years as gunner, but with four intervals of a few days each between each period of three years' service: Under the old law he would, after each new entry, have been paid as in his first three years, because he would have been given a new warrant with a new date. Under the act of 1883, as we construe it, he would be credited upon each of his four warrants with the time of all prior service, but the accounting officers would give him credit only upon his last warrant. This would be very far from treating the claimant as though (in the words of the act) "all of his service had been continuous."

It is conceded that if appellee's service as gunner had been continuous, he must, under the act of 1883, have received credit for the time of his enlisted service all through his period of service as gunner. But the gap in his service as gunner was expressly closed by the act of 1882. How is it reopened by the act of 1883?

As has been before argued, in cases under the act of 1883, its intent was to give an officer who had had previous military or naval service an advantage in the mat-

ter of longevity pay over his brother officer entering the same grade from civil life. This would appear just and reasonable, as the former officer would be more valuable, because of his experience, than the latter. Certainly the appellee's services under his first warrant were just as much more valuable because of, and just as much entitled to the increased compensation growing out of his enlisted service, as were his services under his second warrant.

We submit that the judgment should be affirmed.

ROB'T B. LINES,
JOHN PAUL JONES.